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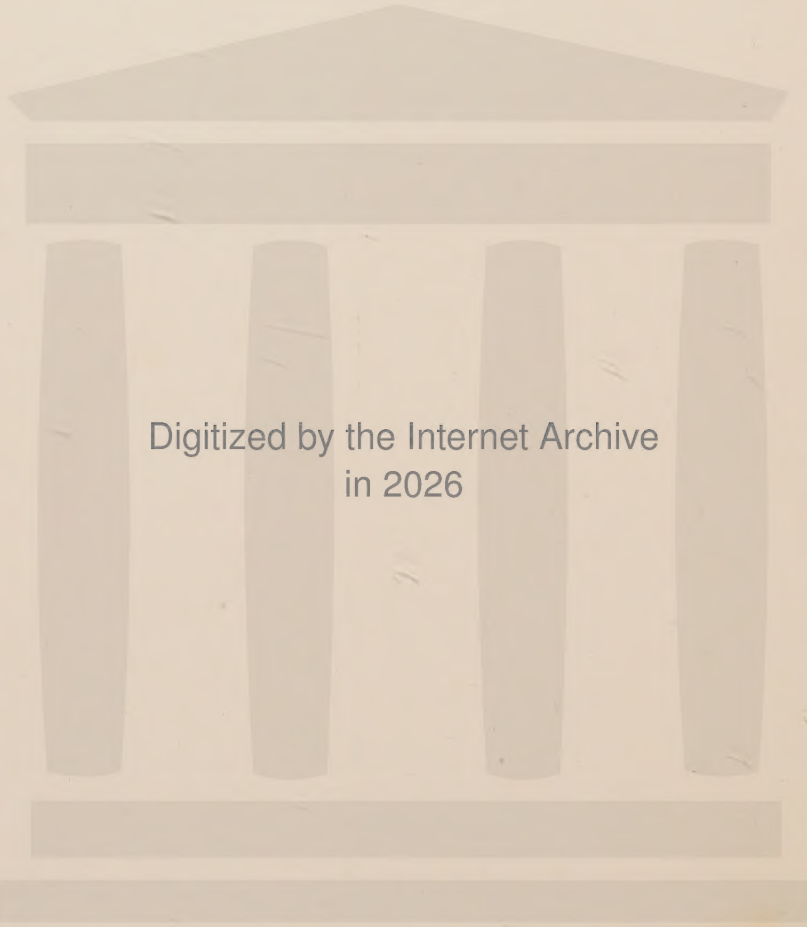


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CASES  
ON  
ADMINISTRATIVE LAW

SELECTED FROM DECISIONS OF  
ENGLISH AND AMERICAN COURTS

SECOND EDITION

By ERNST FREUND  
PROFESSOR OF LAW IN THE UNIVERSITY OF CHICAGO

AMERICAN CASEBOOK SERIES  
WILLIAM REYNOLDS VANCE  
GENERAL EDITOR

ST. PAUL  
WEST PUBLISHING COMPANY  
1928



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FR.ADM.LAW (2D ED.)

## INTRODUCTION TO THE SECOND EDITION

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A good deal of reflection, extending over many years in using the first edition of this casebook, has not led the author to consider fundamental changes in scope or plan to be necessary or desirable. Administrative law can be most effectively dealt with in a law school as a course on the exercise of administrative power and its subjection or non-subjection to judicial control. The three main divisions of the subject are thus administrative power and action, relief against administrative action, and administrative finality; the last division appearing in this edition under a new name and with a new arrangement of cases. } note

Administrative Law continues to be treated as law controlling the administration, and not as law produced by the administration. Teacher and student will be able to glean from the cases a good deal of information concerning administrative practice; but to treat administrative practice as a source of law would for the present be an undertaking more suitable for a seminar than for a law school course.

A good many changes and additions have been introduced. The changes, it is hoped, are in the direction of the clarification of the law, particularly as to the nature of administrative orders and their relation to judicial and to legislative action, and as to the proof of official acts. Additions have been called for by the general development of administrative law since 1910; new sections have been given to commission proceedings, proceedings against aliens, and the grant and refusal of licenses, the procedural aspects of the latter having been greatly affected by new statutes and decisions. There have been also significant developments in other subjects, which had to be noted by the admission of new illustrative cases.

To offset these additions, a number of cases have been eliminated. An effort has been made especially to relieve the course as far as possible of purely constitutional problems, which are taken care of in other courses. A close examination of some of the constitutional cases included in the first edition shows that, while they are of interest as abstract discussions of what due process requires or does not require, these discussions had little to do with the actual facts, and have little bearing upon typical situations presented in the exercise of administrative powers. This observation applies to such cases of the United States Supreme Court as *Murray's Lessee v. Hoboken Land and Improvement Co.*, *Cary v. Curtis*, *U. S. v. Ju Toy*, and the first Minnesota rate case, the *Sisson* case and the *Salem-Eastern R. R. Co.* case in Mas-



sachusetts, and the Trinity Church case in New York—all cases well known to students of constitutional law.

In a majority of instances it was found that only a part of the opinion could be used to advantage, and so, to avoid the necessity of useless repetition in the footnotes, attention is here called to that fact; all omissions being indicated, however, by asterisks.

The subject of administrative regulations has been omitted, since the case material is inadequate for its proper understanding.

I am publishing, about contemporaneously with these cases, a systematic study of Administrative Powers over Persons and Property, upon the basis of a comparative survey of statute law. This gives an entirely different approach to the subject of administrative law, showing that legislation has been an even more important factor in its development than the decisions of the courts. The case material will, however, still be found a satisfactory basis for introducing the law student into the subject. The instructor may find in the treatise a good deal of matter to illustrate or supplement this collection of cases.

I am indebted to Professors Edwin M. Borchard, of Yale University, and E. Blythe Stason, of the University of Michigan, for calling my attention to several cases cited or quoted in the notes, which would have otherwise escaped me.

ERNST FREUND.

The University of Chicago, April, 1928.

# INTRODUCTION TO THE FIRST EDITION

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THE subject of administrative law covers a number of topics, which in treatises and digests are generally divided between the law of public officers and the law of extraordinary legal remedies, but which will also be found treated incidentally under such various heads as municipal corporations, taxation, highways, elections, intoxicating liquors, nuisances, public health, public lands, etc.

The common element, which gives the subject its unity, is the exercise of administrative power affecting private rights, and the term "administrative law" has in relatively recent times gained acceptance as the best designation for the system of legal principles which settle the conflicting claims of executive or administrative authority on the one side, and of individual or private right on the other.<sup>1</sup>

The more general bearings of this branch of the law, from a constitutional and comparative point of view, have repeatedly engaged the attention of eminent publicists. E. Dicey, *The Law of the Constitution*, c. 12; E. M. Parker, 19 *Harvard Law Review*, p. 335; A. L. Lowell, *Government of England*, vol. 2, c. 52, pp. 489-504.

In France, the dissatisfaction and irritation caused by the resistance of a powerful and conservative judiciary to the policies of the government, before and at the time of the revolution, had given rise to a theory of separation of powers, according to which certain classes of controversies involving matters of public administration were withdrawn from the regular courts and assigned to distinctive administrative tribunals.<sup>2</sup>

This system of administrative jurisdictions subsequently spread to other parts of continental Europe, and it is natural that the existence of courts exclusively concerned with questions of administrative law should have given that department of law a recognized status in the jurisprudence of the continental states.

The common law, on the other hand, has never given to the public

<sup>1</sup> See F. J. Goodnow, *Comparative Administrative Law*, N. Y., 1893 (reviewed in an article by the author of this collection in *IX Political Science Quarterly*, 403); F. J. Goodnow, *Principles of Administrative Law in the United States*, N. Y., 1905; B. Wyman, *Administrative Law*, St. Paul, 1903.

<sup>2</sup> The regular civil and criminal courts, however, likewise take cognizance of many causes of action involving the validity of administrative acts, so wherever prosecutions are instituted for penalties, where suits for damages are brought against public officers, and where the government seeks to condemn private property for public use.



law a similar recognition as a distinct part of its system. While old established differences of judicature and procedure have served to mark off the criminal law from civil rights and remedies, there has been no similar line of demarcation for the public law, the very name of which has no place in the technical language of the common law. It was, however, inevitable that the common law, when applied to matters of public administration, should develop principles in many respects different from those governing ordinary private rights.

In the first place, important privileges and immunities were conceded to the Crown. It is true that the English law made no distinction between the proprietary and the governmental capacity of the Crown, but in so far as the Crown represented the executive government, the law of the Prerogative meant also an exemption of public rights from the ordinary rules of the common law.

In the second place, while the Crown did not identify itself with all its subordinate organs, and while therefore the liability of public officers was from the earliest times treated as a matter of common law, yet compensatory relief by actions for damages against officers came, generally speaking, to be confined to cases where the illegal act constituted trespass or conversion. Municipal corporations have generally been conceded immunity from liability where they act in a governmental and not in a proprietary capacity. The state and the general government have succeeded to the immunity of the Crown from being sued, and the creation of a statutory right to obtain pecuniary relief from the public treasury for losses suffered through administrative error or default is the exception and not the rule. (As a consequence, the right to compensatory relief, which is the backbone of the common law, has only a very limited application in matters of public administration.)

In the third place, the right to specific relief is represented by the extraordinary legal remedies, supplemented by the slowly expanding jurisdiction of courts of equity to restrain administrative acts which are in violation of individual rights.

These extraordinary remedies differ in important particulars from other rights of action. They are not matter of absolute right, but are granted or refused by the courts according to a judicial discretion governed by considerations of public policy.

Moreover, even in those states in which in ordinary civil controversies the forms of action have been reduced to one, there survives, as a needless legal archaism, the distinctiveness of the different extraordinary legal remedies, with provinces in part mutually exclusive, and in part concurrent, differing in scope and application in the several states, with arbitrary boundary lines, sometimes due to historical misunderstandings, and in their aggregate furnishing a highly technical and not entirely adequate system of judicial control of administrative action.

Every case, therefore, arising out of an administrative controversy involves in the first instance the question through which of the various forms of remedies relief must be sought.

There is no state in which the law grants, in general terms, a right to appeal to the courts from every administrative decision affecting individual rights, and alleged to involve either a misconstruction of law, or an erroneous finding of facts, or an abuse of discretion. Nor is such an appeal, as a rule, given by statutes creating new administrative powers, the legislatures being, generally speaking, content to leave the individual right of redress to the system of remedies which has been developed by the unwritten law.

If no remedy at all is available, it must be that the legislature has vested in an administrative authority a power of conclusive determination. Where such determination has the effect of impairing common-law rights, and not merely rights or privileges of legislative creation, or subject to absolute legislative disposition, a constitutional question will arise, whether such determination satisfies the requirement of due process of law.

Since practically every act of exercise of administrative power must be authorized by legislation, the operation of general principles of administrative law is constantly affected, and frequently controlled, by the language of statutes. Questions of administrative law, in other words, often resolve themselves into questions of statutory construction. However, the constant recurrence of certain types of legislation has evolved principles of construction, which, in view of the rapid and enormous growth of public regulation of all kinds of interests, are as deserving of careful study as common-law principles.

The term "administrative law" is sometimes applied to all provisions of law regulating matters of public administration, such as civil service, elections, municipal government, schools, public revenue, or highways. In so far as such legislation involves problems of public policy and of administrative efficiency, it concerns the student of political science and of public administration. The chief concern of administrative law, on the other hand, as of all other branches of civil law, is the protection of private rights, and its subject-matter is therefore the nature and the mode of exercise of administrative power and the system of relief against administrative action. This limitation of the subject seems conformable to the prevailing usage and understanding in this country, while on the continent of Europe all positive statutory law is treated as belonging to the province of administrative law.





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# CASES

## ON

# ADMINISTRATIVE LAW

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### PART 1

### ADMINISTRATIVE POWER AND ACTION

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#### CHAPTER 1

#### THE ADMINISTRATIVE ORDER

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#### SECTION 1.—ITS EXECUTIVE AND ITS JUDICIAL ASPECT (QUESTION OF MANDATORY EFFECT)

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##### — FULLER et al. v. COUNTY OF COLFAX.

Circuit Court of United States, District of Nebraska, 1882. 14 Fed. 177.

On motion to remand cause to state court.

DUNDY, District Judge. This cause was removed into this court from a state court held within and for Colfax county. The defendant moves to remand the same, for the reason that the suit was removed from an appellate court and not from the one in which the suit was brought.<sup>1</sup> If this be true it must, of necessity, be decisive of the motion.

In considering the motion two questions arise—First, is a board of county commissioners a court within the meaning of the removal acts of Congress; and, second, is a mere claim for damages for right of way for a public road, presented to the county board, a suit within the meaning of the said removal acts, so long as the claim there remains for consideration.

The state law provides for paying for the right of way necessary in locating all public roads. If damages are sustained by the owners of

<sup>1</sup> Act Cong. March 3, 1875, c. 137, § 3, provided that the petition for removal must be filed "in such suit in such state court before or at the term at which said cause could be first tried and before the trial thereof."

land through which a road is located, the county is primarily liable therefor, and the manner of making the claim as well as the mode of making the payment is here perfectly well understood. After the location of the road all that seems to be necessary for the injured party to do is to make known to the county board the fact that damages are claimed for the right of way. If the claim is thought to be just and reasonable the county board allows it, and draws warrants on the county treasurer for the amount of damages awarded. If the claimant should be dissatisfied with the amount of damages so awarded him, he can appeal to the district court of the proper county, where the case is to be tried de novo. Thus it will be seen that the remedy provided by law in cases like the present one is alike speedy, efficacious, inexpensive.

The plaintiffs were damaged, as they claim, in consequence of a public road being located through their lands; and they presented to the county board a claim in the sum of \$5,000 therefor. The board reduced the claim, or sum allowed, to \$250, and the claimants appealed to the district court, all of which was done in strict accordance with the law. In presenting a claim to the county board for allowance, no formal proceedings are at all necessary, no pleadings of any sort are required to be filed, no process issued for any purpose whatever connected with the matter, and no formal judgment follows either the rejection or allowance of a claim by the board. The claim, when so made, is simply audited, allowed, or rejected, as justice and reason seem to require. In case of an appeal to the district court, the appeal is docketed, and pleadings are filed, and the cause then in all respects proceeds in the usual and ordinary way. The cause is then, in every sense of the term, in a court, and is also, then, in every sense of the term, a suit.

Now, what is usually understood by the words "court" and "suit," where we find them in legislative enactments or in legal proceedings? Blackstone says a "court is a place wherein justice is judicially administered." To administer justice judicially, there must be a judge, and usually, though not always, there are also other officers, such as clerk and sheriff or marshal. That also implies the right to issue compulsory process to bring parties before the court, so that jurisdiction may be acquired over the person or property which forms the subject-matter of the controversy. To administer justice judicially two parties to a controversy must exist; there must be a wrong done or threatened, or a right withheld, before the court can act. Then a hearing or trial follows, and the "justice to be judicially administered" results in a formal judgment for one of the parties to the controversy. The judgment to be pronounced usually has full binding force, unless modified or reversed. The courts can issue the proper process to carry their judgments into effect, and in that way subserve the great ends of their creation. But this is not so with the county boards in this state. They are not clothed with the neces-



sary power to issue compulsory process to bring parties litigant before them. They cannot, in cases like the one under consideration, issue process to compel the attendance of witnesses. They cannot and do not enter formal judgments in cases presented to them for their consideration. They have no authority to execute any judgments if they should thoughtlessly undertake to enter them. They have but one party before them on whom their orders can operate. In short, the county board is so totally unlike a court, and so different in its constitution and its objects, that I am unable to see any similarity between them.

If the county board cannot be regarded as a court, it will follow as a necessary consequence that no suit was pending in this case until the appeal from the order of the board was filed and docketed in the district court. Two parties to a suit seem to be almost indispensable: One who seeks redress, and the other who commits a wrong or withholds what is justly due another. The parties must stand in such relation to each other that the machinery of the court will operate on them when their powers and their aid are invoked. No such a condition of things existed so long as this claim remained before the county board. But when the appeal was taken, and docketed in the district court, we then for the first time find a suit pending in the court where none of the elements of either are wanting. It is such a suit that can be removed from such a court, as the removal acts of Congress contemplate.

I conclude, then, that the board of county commissioners of Colfax county is not a "court," and that this "suit" was never pending in any other court than the district court of Colfax county, from which it was removed to this court, and that it was, therefore, properly removed herein.

The motion to remand is overruled.<sup>2</sup>

McCRARY, Circuit Judge, concurs.

<sup>2</sup> "The right of appeal from the action of boards in their administrative character is frequently conferred by statute. The appeal in such cases is not permitted because the action of the board is considered judicial; but it is granted as a method of getting the matter involved before a court, that it may be determined judicially." Board of Commissioners of Huntington County v. Heaston, 144 Ind. 583, 591, 41 N. E. 457 (1895).

See, also, United States v. Ritchie, 17 How. 525, 15 L. Ed. 236 (1854).

The proceeding in a county court for the formation of a road improvement district, being adversary, is judicial and removable. Commissioners of Road District v. St. Louis S. W. R. Co., 257 U. S. 547, 42 S. Ct. 250, 66 L. Ed. 364 (1922).

See W. E. Hotchkiss, The Judicial Work of the Comptroller of the Treasury, Cornell Studies in History and Political Science, vol. III, 1911; O. R. McGuire, U. S. Accounting Officers and Judicial Precedents, 19 Ill. Law Rev. 523.

## HARTMAN v. MAYOR, ETC., OF CITY OF WILMINGTON.

Superior Court of Delaware, 1894. 1 Marv. 215, 41 Atl. 74.

Certiorari by Maria C. Hartman against the Mayor and Council of City of Wilmington to review proceedings of a municipal board of health. Exceptions dismissed.

The plaintiff was the owner of a dwelling house in the city of Wilmington, against which proceedings were taken by the board of health for the abatement of an alleged nuisance resulting from a wet cellar. The record upon which certiorari issued simply disclosed that the executive officer of the board of health reported the following nuisance (among others): "M. C. Hartman, 705 South Harrison St., wet cellar." The provisions of the statutes, charter, and ordinances bearing upon the subject are referred to in the argument of counsel.

CULLEN, J. This is a certiorari under very peculiar circumstances, and we will not attempt to go into any extended review of the different matters and principles upon which this case rests, but shall merely state the general principles involved, upon which we dismiss these exceptions.

It appears that there was a proceeding originally commenced under an act of assembly vesting in the board of health of this city certain powers and authority in relation to matters mentioned under their immediate jurisdiction. The result of the action of the board of health is not a judgment. This is a power that is conferred and which is acted on by the board of health by force of the police power, which is part of the sovereignty of the state. The state may delegate those powers, and it has in this case delegated to the board of health the power, upon complaint coming before them, to determine whether or not a thing is deleterious or injurious to the community generally; and they may examine that matter, and inquire into and investigate it. And upon this investigation, if the person upon due notice does not remove that which is deleterious—you may call it a nuisance—then the board of health have the right to remove or abate the nuisance.

It is contended that there was no notice given in this case before they proceeded. Every person, of course, has his right to a day in court; but the board of health act upon these matters like a grand jury, for instance, where there is a charge against a person—on one side of the matter. When the matter is determined by them, it is not a judgment. They simply determine that a certain matter is a nuisance. Then, when it is so determined, it is their duty to notify the party that a nuisance exists on his premises, and that he is required to remove it within a certain time, which is by them specified. The act does not prescribe a particular time in which it must be done, because the time it takes to remove it must necessarily depend upon the nature and character of the nuisance to be abated. Five days might

be enough in one case, while it might take two, three, five, or six months in another.

When it is determined by the board of health, acting under the police power vested in them by the Legislature or the sovereign power of the state, that a certain thing is a nuisance, it becomes their duty for the first time to notify the party of the fact that a nuisance exists on his place; that is, notice is given to him of that fact. It is nothing more or less, in our judgment, than that "a nuisance exists on your place, and we require you to remove it in so many days." The party's rights have not been invaded. It has been a mere matter of investigation. And then he may, if he see fit, have his day in court. He has an impartial, full, and complete remedy. For the first time the case enters into trial when both parties are represented. He may appeal to the chancellor for an injunction to stay the action, and commence an action whereby his rights may be determined by proceedings in chancery. If he sees fit to allow the matter to go on, and if the board of health have violated the powers vested in them in removing the matter, then they become personally liable.

Were it otherwise, what would become of the community, and what would police regulations amount to? Parties must act in an emergency. If the board of health act in an emergency, still there is time left for the opposite party, if he wishes, to contest their action. Their action is not a legal judgment, such as is contemplated under the law, to which a certiorari at common law may issue.

We think, therefore, under the circumstances, that this is not a case in which a certiorari would lie, and therefore dismiss the exceptions.<sup>3</sup>

<sup>3</sup> See Sidney and Beatrice Webb, *The Parish and the County*, p. 419: "Neither the individual magistrate nor the divisional sessions made any distinction between (1) a judicial decision as to the criminality of the past conduct of particular individuals; (2) an administrative order to be obeyed by officials; and (3) a legislative resolution enunciating a new rule of conduct to be observed for the future by all concerned. All alike were, in theory, judicial acts. Though many of these orders were plainly discretionary, and determined only by the justices' views of social expediency, they were all assumed to be based upon evidence of fact, and done in strict accordance with law."

Id. p. 309: "And though, under particular statutes, individual justices or pairs of justices could appoint parish officers, allow their accounts, authorize rates, direct the mending of foundrous roads, order relief to a destitute person, command a father to pay a weekly sum for the maintenance of a bastard, apprentice a poor child, or remove a pauper to his place of settlement, the fact that there was in all these cases a right of appeal to the Superior Court of Quarter Sessions indicates that, in the eye of the law 'our county rulers have been, not prefects controlled by a bureau, but justices controlled by a court of law'; that even their apparently executive duties had to be done 'with judicial forms and in a judicial spirit'; and that their most discretionary orders partook of the nature of judicial decisions, to be given only on evidence, and 'according to the straight rule and course of the law.'"

See *La Croix v. County Commissioners*, 50 Conn. 321, 324, 325, 47 Am. Rep. 648 (1882).



STATE ex rel. IVES, Atty. Gen., v. KANSAS CENT. R. CO. et al.

Supreme Court of Kansas, 1891. 47 Kan. 497, 28 Pac. 208.

Application by the State, on relation of the Attorney General, for a peremptory writ of mandamus to compel the Kansas Central Railroad Company and the Union Pacific Railway Company to repair the tracks of the former company. Alternative writ quashed on motion of defendants.

The powers and duties of the board of railroad commissioners of the state, as prescribed by the statute, so far as necessary to be referred to in the determination of this case, are as follows:

"Par. 1328. Said commissioners shall have the general supervision of all railroads in the state operated by steam, and all express companies, sleeping-car companies, and all other persons, companies, or corporations doing business as common carriers in this state; and shall inquire into any neglect or violation of the laws of this state by any person, company, or corporation engaged in the business of transportation of persons or property therein, or by the officers, agents, or employes thereof; and shall also from time to time carefully examine and inspect the condition of each railroad in the state, and of its equipment, and the manner of its conduct and management, with reference to the public safety and convenience. Whenever, in the judgment of the railroad commissioners, it shall appear that any railroad corporation, or other transportation company, fails, in any respect or particular, to comply with the terms of its charter or the laws of the state, or whenever in their judgment any repairs are necessary upon its road, or any addition to its rolling stock, or any addition to or change of its stations or station-houses, or any change in its rates for transporting freight, or any change in the mode of operating its road and conducting its business, is reasonable and expedient in order to promote the security, convenience and accommodation of the public, said commissioners shall inform such corporation of the improvement and changes which they adjudge to be proper, by a notice thereof in writing, to be served by leaving a copy thereof, certified by the commissioners' secretary, with any station agent, clerk, treasurer, or any director of said corporation, and a report of the proceedings shall be included in the annual report of the commissioners to the Governor. Nothing in this section shall be construed as relieving any railroad company, or other transportation corporation, from their responsibility or liability for damages to person or property." Act March 8, 1883, c. 124, § 5.

HORTON, C. J. The question for our consideration in this case is not what power the Legislature of the state may delegate or confer upon the board of railroad commissioners, but what power is conferred by the existing statutes. It is contended upon the part of the state that the finding of the railroad commissioners of the 13th day of



May, 1891, that the Kansas Central Railroad "is in an unsafe and dangerous condition for the transportation of persons and property by reason of the insufficient condition and weight of the iron rails in the tracks thereof," is final and conclusive upon the defendants and this court. Further, that the order of the commissioners, requiring the Kansas Central Railroad to be relaid with new rails of standard pattern, and of not less weight than 56 pounds to the lineal yard, is also final and conclusive; that, in proceedings in this court to compel a compliance with the order of the commissioners, the statute neither contemplates nor allows any issue to be made or inquiry had of the condition of the railroad examined by the commissioners, or of the reasonableness of the order made by them. The defendants claim that the order of the commissioners, under the terms of the statute, is advisory only. If the finding of the commissioners and their order is final and conclusive, this court has no power to hear or determine any issue of fact, except upon the allegation that the defendants have refused to comply with the order for repairs. If the finding and order of the commissioners are final and conclusive, this court, upon a railroad company refusing a compliance therewith, must at once, upon proper application being made, register the order and enforce the same literally.

The power which is claimed by the commissioners to be conferred upon them, so far as this case is concerned, must be found, if found anywhere, in section 5, c. 124, Sess. Laws 1883 (paragraph 1328, Gen St. 1889). The Legislature has not conferred upon the commissioners by said statute the power claimed. There is nothing in the statute which states, or can be construed to state, that the orders of the commissioners concerning repairs upon a railroad shall be final or conclusive, or that the courts must carry out their determinations or judgments. Upon the other hand, the statute provides only that whenever, in the judgment of the commissioners, any repairs upon a railroad are demanded for the security, convenience, and accommodation of the public, they shall inform the railroad corporation of the improvements and changes which they adjudge to be necessary, and then report their proceedings to the Governor. Nowhere is it stated in the statute that the recommendations of the commissioners concerning repairs must be complied with *nolens volens* by the company; nor does the statute authorize the Governor to carry into execution the order of the commissioners. As to the necessary repairs of a railroad, the finding and order of the commissioners, under the statute, are advisory only—nothing more. The order cannot be enforced by the commissioners; it cannot be enforced by the Governor; and it cannot be enforced specifically by this or any other court.

\* \* \*

In the first report of the commissioners, their powers under said section 5 were very clearly and fully defined by them. They said:

"The commissioners, under this section, have no power to enforce an order. They can simply advise the company in fault of the changes desired or deemed necessary. To have invested the commission with the power to enforce its own orders, it would have been necessary to have changed the character of the board and the scope of its functions and powers. It would have been necessary to have given to the commission all the powers of a court of chancery, to be exercised within the scope of its assigned duties, with such ministerial officers attached to the board as are usual and necessary to such tribunals, to execute its injunctions and mandates. It would have rendered it necessary to have instituted a formal investigation, upon proper complaint and notice to the company complained of, and the rendition of a formal judgment and decree upon the evidence which should be submitted to the board. Manifestly, in such case, it would have been improper for the board to have acted upon knowledge and information gathered from personal observation, or the ex parte statements of individuals, as much so as it would be for regularly organized courts to act judicially upon evidence which has never been disclosed to the opposite party to the suit. The supervisory powers of the commission would in such case extend only to such matters as should be formally brought before it by complaint, and no such complaint would be made until some one had become the suffering victim of some neglect, failure, or other violation of duty on the part of a railroad company. Thus the chief benefits which were intended to be secured by giving the commissioners general supervisory powers would be sacrificed by imposing upon them those limitations in the exercise of functions which are necessary to impress upon judicial decrees the weight and character of impartiality." First Annual Report of Railroad Commissioners for 1883, p. 4. \* \* \*

It is an historical fact, well known by those who attended the session of the Legislature of 1883, and by those acquainted with the proceedings of that body, that there was a bitter contention among its members as to what power should be conferred upon or delegated to the commissioners to be appointed under the act or bill then pending for adoption. A part of the members, under the lead of Hon. Eugene F. Ware and others, were favorable to the delegation to the commissioners and the court's full authority for the enforcement of their orders; others, and a majority, opposed the delegation of such power; and the result was that advisory action only on the part of the commissioners was provided for. The national interstate commerce act of February 4, 1887, differs widely from the act of 1883 of our Legislature, in expressly providing for writs of mandamus to be issued out of the United States Circuit Courts to compel railroad companies to comply with the orders of the national commission, and also for punishing in such courts railroad companies for violating or neglecting

to obey any lawful order or requirement of the national commission.  
Volume 1, Interstate Commerce Commission Reports, 665-671.

\* \* \*

#### NOTE.

Extracts from the annual reports of the Kansas Board of Railroad Commissioners:

1887—p. 35: "While there is no express provision of law to enforce the orders of the Board, and those made in respect to furnishing additional railroad facilities at any given point are not imperative in form, they are, so long as they remain unmodified by the Board, or by some other public agency superior in function to it, obligatory upon railroad companies. Made as they are, under authority of the statutes of the state, and in pursuance to their provisions and requirements, they are in a most important sense the recommendations of the state, and railroad companies are not at liberty to ignore them. Fortunately there has been but little occasion to complain in the past in this regard."

1891—p. iv: "Attention is respectfully called to failure and refusal of companies to respond to recommendations of the Board relating to added train service and needed improvements in physical condition of track and roadbed, in order to insure a reasonable service to the public in promptness and personal safety. \* \* \* In connection with the above, attention is respectfully called to the case of the Kansas Central Railway, owned by the Union Pacific Company, which was reported to you, and made a matter of contention in the Supreme Court at the instance of the Attorney General. The rule of law laid down by the Supreme Court in that case applies to all of those above reported to you. It was held that the power of the Commission in respect to repairs of track, extent and kind of train service, were advisory only, and that procedure must be by *mandamus* and a trial of fact as to the reasonableness of the recommendation of the Commission.\* The action in that case not having been amended and pursued in the form indicated by the Supreme Court, all seem now to rest upon a common plane, and are submitted without suggestion or recommendation."

1892—p. x: "It is respectfully recommended that provision be made by statute for the enforcement, by appropriate remedy, in courts having jurisdiction, of the orders and decisions of the Board. It should be provided by law that the order of the Railroad Commissioners shall be the governing law of the railroad companies, to be obeyed and respected by them, until vacated by a competent judicial tribunal on appeal. To allow a suspension of the order of the Commissioners pending appeal by the companies, is to make a farce of the whole commissioner system."

1894—p. 4: "We desire to call the attention of your Excellency to the defective and inadequate provisions of the law relating to the duties and powers of this Board. The authority of the Board to enforce its orders is so limited that in many cases its rulings practically amount to recommendations, which may or may not be complied with, as best suits the convenience of the companies to whom they are made. It would seem that the law should make it obligatory upon some person, perhaps the attorney general, to enforce such orders as the Board may make. The Act of March 6, 1883, was supposed to cover this point, but its provisions are somewhat indefinite and uncertain."

\* \* \*

See *People v. New York, Lake Erie & Western Railroad Company*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 434 (1887): "In regard to the facts there is no dispute. A plainer case could hardly be presented of a deliberate and intentional disregard of the public interest and the accommodation of the public. The railroad commissioners have thought that it was essential for those purposes that a new and enlarged building for passengers and freight should be erected. That, it is true, was a question for them to decide. The statute (Laws 1882, c. 353) created a commission of 'competent persons'; required from them an official constitutional oath; assigned to them an office for the transaction of business; provided a clerk to administer oaths to witnesses, and a marshal to summon them; gave full power of investigation

\* *Comp. Northern Pac. R. Co. v. Washington*, 142 U. S. 492, 12 S. Ct. 283, 35 L. Ed. 1092 (1892).



and supervision of all railroads and their condition, with reference not only to the security, but accommodation, of the public; and declared that whenever, in their judgment, it shall appear, among other things, that any addition to or change of the stations or station-houses is necessary to promote the security, convenience, or accommodation of the public, they shall give notice to the corporation of the improvements and changes which they deem to be proper, and, if they are not made, they shall present the facts to the Attorney General for his consideration and action, and also to the Legislature. All these things have been done. The commissioners have heard and decided. They can do no more. After so much preliminary action by a body wisely organized to exercise useful and beneficial functions, it might well be thought unfortunate that some additional machinery had not been provided to carry into effect their decision. By creating, the statute recognizes the necessity for such a tribunal to adjust conflicting interests and controversies between the people and the corporation. It has clothed it with judicial powers to hear and determine, upon notice, questions arising between these parties, but it goes no further. Its proceedings and determinations, however characterized, amount to nothing more than an inquest for information. We find no law by which a court can carry into effect their decision. At this point the law fails, not only by its incompleteness and omission to furnish a remedy, but by its express provision that no request or advice of the board, 'nor any investigation or report made by it,' shall have the effect to impair the legal rights of any railroad corporation. The Attorney General is given no new power. He may consider the result of the investigation made by the commissioners, and their decision, and so may the company; but we must look further for his right of action, and the corporation, disregarding the judgment of the commissioners, may continue the management of its business in its own way—may determine in its own discretion to what extent, and in what manner, the exercise of a public trust requires it to subserve the 'security, convenience; and accommodation of the public.'"

Section 6 of the New York act of 1882, above referred to, was subsequently changed, so as to read as follows: "If in the judgment of the board, after a careful personal examination of the same, it shall appear that repairs are necessary upon any railroad in the state, or that any addition to the rolling stock, or any addition to or change of the station or station-houses, or that additional terminal facilities shall be afforded, or that any change of the rates of fare for transporting freight or passengers or in the mode of operating the road or conducting its business, is reasonable and expedient in order to promote the security, convenience and accommodation of the public, the board shall give notice and information in writing to the corporation of the improvements and changes which they deem to be proper, and shall give such corporation an opportunity for a full hearing thereof, and if the corporation refuses or neglects to make such repairs, improvements and changes, within a reasonable time after such information and hearing, and fails to satisfy the board that no action is required to be taken by it, the board shall fix the time within which the same shall be made, which time it may extend. *It shall be the duty of the corporation, person or persons owning or operating the railroad to comply with such decisions and recommendations of the board as are just and reasonable.* If it fails to do so the board shall present the facts in the case to the Attorney General for his consideration and action, and shall also report them in its annual or in a special report to the Legislature." New York Railroad Law (Laws 1890, c. 565) § 161.

See *People ex rel. Linton v. Brooklyn Heights R. Co.*, 172 N. Y. 90, 64 N. E. 788 (1902). The way to compel action by railroad corporations is by first applying to the railroad commissioners, and not by judicial proceedings in the first instance.

Act of Congress April 10, 1918 (Webb-Pomerene Act relating to Export Trade Associations) 40 Stat. 516 (15 USCA § 65). Section 5, par. 2: "Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally



enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein, it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper. \* \* \*

#### 44- KENTUCKY & I. BRIDGE CO. v. LOUISVILLE & N. R. CO.

Circuit Court of United States, District of Kentucky, 1889. 37 Fed. 567, 2 L. R. A. 289.

JACKSON, Circuit Judge. \* \* \* In support of their position that judicial powers are conferred upon and exercised by the commission, counsel refer to various provisions contained in sections 12, 13, 14, 15, 16, 17, and 18 of the act [Act Feb. 4, 1887, c. 104, 24 Stat. 383-386 (U. S. Comp. St. 1901, pp. 3162-3168)], which, together with the rules of practice adopted, show, as they insist, that a proceeding before the commission, like the one in question, involves and embodies features and earmarks of judicial procedure and action in the following particulars, viz.: First, a petition, corresponding with the petition or bill in equity, is filed; second, notice is issued for, and service thereof made upon, the defendant or party complained of, conforming to, and corresponding with, the process of subpœna in courts of the United States, requiring such defendant to satisfy the complainant, or to appear and answer the same; third, the filing of defendant's answer, as in equity, which makes up or forms the issue; fourth, the issuance of subpœnas requiring the attendance of witnesses, or for the taking of depositions, upon the issues made up by the answer; fifth, the assignment of a time and place for the hearing, when and where the parties appear in person or by attorney, witnesses are sworn and examined, and arguments are made orally or by brief; sixth, when the conclusion is reached, a written report, corresponding in all respects to an opinion, is delivered, filed, and published; seventh, the order of the commission is recorded by its secretary, as decrees in equity are recorded by clerks of court; and, eighth, a copy of such order, under the seal of the commission, issues to the defendant, requiring obedience thereto.

This mode of procedure certainly conforms in many respects to the regular practice of courts, and is no doubt authorized by the law; but does it involve the performance of judicial acts, and the exercise of judicial powers, by the commission, as claimed? It is well settled that Congress, in ordaining and establishing "inferior courts," and prescribing their jurisdiction, must confer upon the judges appointed

to administer them the constitutional tenure of office, that of holding "during good behavior," before they can become invested with any portion of the judicial power of the government; and if the act to regulate interstate commerce does in fact establish an inferior court, the commissioners appointed thereunder for certain fixed periods are clearly not such judges as can be invested with any portion of the judicial power of the United States, and their decision in matters affecting personal or property rights could have no force or validity. But does the interstate commerce law undertake either to create an "inferior court" or to invest the commission appointed thereunder with judicial functions? We think not. While the commission possesses and exercises certain powers and functions resembling those conferred upon and exercised by regular courts, it is wanting in several essential constituents of a court. Its action or conclusion upon matters of complaint brought before it for investigation, and which the act designates as the "recommendation," "report," "order," or "requirement" of the board is neither final nor conclusive; nor is the commission invested with any authority to enforce its decision or award. Without reviewing in detail the provisions of the law, we are clearly of the opinion that the commission is invested with only administrative powers of supervision and investigation, which fall far short of making the board a court, or its action judicial, in the proper sense of the term. The commission hears, investigates, and reports upon complaints made before it, involving alleged violations of or omission of duty under the act; but subsequent judicial proceedings are contemplated and provided for, as the remedy for the enforcement, either by itself or the party interested, of its order or report in all cases where the party complained of or against whom its decision is rendered does not yield voluntary obedience thereto. By the fourteenth and sixteenth sections of the act it is provided that the report or findings made by the commission "should thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found."

The commission is charged with the duty of investigating and reporting upon complaints, and the facts found or reported by it are only given the force and weight of prima facie evidence in all such judicial proceedings as may thereafter be required or had for the enforcement of its recommendation or order. The functions of the commission are those of referees or special commissioners, appointed to make preliminary investigation of and report upon matters for subsequent judicial examination and determination. In respect to interstate commerce matters covered by the law, the commission may be regarded as the general referee of each and every Circuit Court of the United States, upon which the jurisdiction is conferred of enforcing the rights, duties, and obligations recognized and imposed by the act. It is neither a federal court under the Constitution, nor does it exercise judicial powers, nor do its conclusions possess the efficacy of

judicial proceedings. This federal commission has assigned to it the duties, and performs for the United States, in respect to that interstate commerce committed by the Constitution to the exclusive care and jurisdiction of Congress, the same functions which state commissioners exercise in respect to local or purely internal commerce, over which the states appointing them have exclusive control. Their validity in their respective spheres of operation stands upon the same footing. The validity of state commissioners invested with powers as ample and large as those conferred upon the federal commissioners has not been successfully questioned, when limited to that local or internal commerce over which the states have exclusive jurisdiction; and no valid reason is seen for doubting or questioning the authority of Congress, under its sovereign and exclusive power to regulate commerce among the several states, to create like commissions for the purpose of supervising, investigating, and reporting upon matters or complaints connected with or growing out of interstate commerce. What one sovereign may do in respect to matters within its exclusive control, the other may certainly do in respect to matters over which it has exclusive authority.

We are also clearly of opinion, that this court is not made by the act the mere executioner of the commissioner's order or recommendation, so as to impose upon the court a nonjudicial power. \* \* \* The principle announced in these cases<sup>5</sup> would sustain counsel's position, if this court, under the provisions of the interstate commerce law, is limited and restricted to the mere ministerial duty of enforcing an order or requirement of the commission, whether it be regarded as a judicial or a nonjudicial tribunal. But such is not, in fact, the jurisdiction which this court is called upon to exercise. The suit in this court is, under the provisions of the act, an original and independent proceeding, in which the commission's report is made prima facie evidence of the matters or facts therein stated. It is clear that this court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines the cause de novo, upon proper pleadings and proofs, the latter including not only the prima facie facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy. The court is empowered "to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of said commission shall be prima facie (not conclusive) evidence of the matters therein stated." No valid constitutional objection can be urged against making the findings of the commission prima facie evidence in subsequent judicial proceedings. Such a provision

<sup>5</sup> Hayburn's Case, 2 Dall. 409, 1 L. Ed. 436 (1792); U. S. v. Ferreira, 13 How. 40, 14 L. Ed. 42 (1851).



merely prescribes a rule of evidence clearly within well-recognized powers of the Legislature, and in no way encroaches upon the court's proper functions.

NOTE.

Section 15 of the interstate commerce act of 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]) read, until 1906, as follows: "If in any case in which an investigation shall be made by said commission it shall be made to appear to the satisfaction of the commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the commission; and if, within the time specified, it shall be made to appear to the commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law."

This provision was changed by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1909, p. 1158), as follows: "The commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section 13 of this act, or of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this act, for the transportation of persons or property, \* \* \* or that any regulations or practices whatsoever \* \* \* affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the commission find the same to exist, and shall not thereafter publish, demand or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. All orders of the commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time not exceeding two years, as shall be prescribed in the order of the commission, unless the same shall be suspended or modified or set aside by the commission (or be suspended or set aside by a court of competent jurisdiction.)"

Prior to the amendment, it had been held that, while the commission might declare a rate unreasonable, and order a carrier to cease and desist from charging the same, it had no power to prescribe what rate should be a reasonable rate. *Interstate Commerce Com'n v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 17 S. Ct. 896, 42 L. Ed. 243 (1897).

Fifteenth Annual Report of the Interstate Commerce Commission for the Year 1901. V. Complaints.—The work of the Commission which pertains directly to regulation involves two distinct kinds of procedure: One based upon formal petitions filed with the Commission under section 13 of the law, and involving regular hearing and investigation, the preparation of a report setting forth the material facts found and conclusions reached by the Commission, and issuance of an order dismissing the case or directing the carrier or carriers complained against to correct the rate of practice which may be held



unlawful. The other kind of procedure arises in the performance by the Commission of its duty, under the twelfth section, to "execute and enforce the provisions of the act," and relates to complaints presented by letter, the examination of tariffs on file in the office in connection with such complaints and correspondence with shippers and carriers concerning the same. Complaints of the latter class are called informal complaints, to distinguish them from the formal petitions or complaints which constitute the basis of contested cases.

No order can be issued upon an informal complaint and inquiry. The main object of that method of procedure is the speedy disposition, through settlements, readjustments plainly required by the statute, or advice given by the Commission, of matters in which regulation is demanded, and thus to limit the number of contested cases upon the docket. It would be an injustice to complaining shippers and communities, amounting frequently to denial of relief, to compel the institution of a regular proceeding every time cause of complaint is brought to the attention of the Commission; and the number of cases requiring the hearing of witnesses, oral or written argument, and formulated decision would probably be greater than the Commission could dispose of properly or without intolerable delays. The great mass of complaints are handled and disposed of by the Commission by preliminary investigation and correspondence or conference with carriers and shippers. The matters considered and acted upon in this way range from overcharges upon small shipments to rate relations affecting the interests of entire communities, and are of the same nature as those which find their way to the regular case docket of the Commission.

*Memphis Freight Bureau v. St. Louis Southwestern Ry. Co.*, Interstate Commerce Commission, 1910. 18 Interst. Com. Com'n R. 67. Harlan, Commissioner: "The practice rules long ago adopted by the Commission, while not overlooking the definite requirements of the law in this respect, were intended to relieve complainants, so far as possible, from the observance of the technical rules of pleading, in order that shippers unskilled in such matters might bring their troubles to our attention in their own proper persons. The original complaint of the shipper is informal only in the sense that, considered as a pleading, it is altogether inartificial. The essential facts, however, appear, and the document cannot be read without observing that its purpose was to secure the aid of the Commission in adjusting the alleged wrong on the part of the defendant in exacting a rate of 10 cents, instead of a rate of 6 cents, the benefit of which the shippers could have enjoyed had they moved their shipments to destination over a competing line. The latter rate is referred to in the informal complaint as evidence tending to show the unreasonableness of the 10-cent rate exacted by the defendant. If therefore informal complaints of this character are to be accepted under section 16 of the act as a presentation or filing of such claims, we see no reason for not according that effect to the informal complaint of these shippers thus made on August 9, 1906."

## 5 INTERSTATE COMMERCE COMMISSION v. ALABAMA MIDLAND RY. CO.

Supreme Court of the United States, 1897. 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

On the 27th day of June, 1892, the Board of Trade of Troy, Ala., filed a complaint before the Interstate Commerce Commission, at Washington, D. C., against the Alabama Midland Railway Company and the Georgia Central Railroad Company and their connections; claiming that, in the rates charged for transportation of property by the railroad companies mentioned, and their connecting lines, there is a dis-

crimination against the town of Troy, in violation of the terms and provisions of the interstate commerce act of Congress of 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]).

The general ground of complaint is that, Troy being in active competition for business with Montgomery, the defendant lines of railway unjustly discriminate in their rates against the former, and give the latter an undue preference or advantage, in respect to certain commodities and classes of traffic. \* \* \*

The commission, having heard this complaint on the evidence theretofore taken, ordered, on the 15th day of August, 1893, the roads participating in the traffic involved in this case "to cease and desist" from charging, demanding, collecting, or receiving any greater compensation in the aggregate for services rendered in such transportation than is specified as follows, to wit: [The specification is omitted.]

The defendants having failed to heed these orders, the commission thereupon filed this bill of complaint in the Circuit Court of the United States for the Middle District of Alabama, in equity, to compel obedience to the same. On the hearing in said court the bill of complaint was dismissed (69 Fed. 227), and complainant, the Interstate Commerce Commission, appealed the cause to the United States Circuit Court of Appeals for the Fifth Judicial Circuit, at New Orleans, La. And thereupon, in said last-named court, on the 2d day of June, 1896, the decree of the said Circuit Court of the United States for the Middle District of Alabama was in all things duly affirmed (21 C. C. A. 51, 74 Fed. 715), and from this judgment and decree the appellant has appealed to this court.

Mr. Justice SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court. \* \* \*

The first contention we encounter upon this branch of the case is that the Circuit Court had no jurisdiction to review the judgment of the commission upon this question of fact; that the court is only authorized to inquire whether or not the commission has misconstrued the statute, and thereby exceeded its power; that there is no general jurisdiction to take evidence upon the merits of the original controversy; and, especially, that questions under the third section are questions of fact, and not of power, and hence unreviewable.

We think this contention is sufficiently answered by simply referring to those portions of the act which provide that, when the court is invoked by the commission to enforce its lawful orders or requirements, the court shall proceed, as a court of equity, to hear and determine the matter, and in such manner as to do justice in the premises.

In the case of Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935, the findings of the commission were overruled by the Circuit Court, after additional evidence taken in the court, and the decision of the Circuit Court was reviewed in the light of the evidence, and reversed, by the Circuit Court of Appeals; and this court, in reference to the argument

that the commission had not given due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged, held that as the question was one of fact, peculiarly within the province of the commission, and as its conclusions had been accepted and approved by the Circuit Court of Appeals, and as this court found nothing in the record that made it our duty to draw a different conclusion, the decree of the Circuit Court of Appeals should be affirmed. Such a holding clearly implies that there was power in the courts below to consider and apply the evidence, and in this court to review their decisions.

So in the case of *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940, the decision of the Circuit Court of Appeals, which affirmed the validity of the order of the commission, upon the ground that, even if ocean competition should be regarded as creating a dissimilar condition, yet that in the case under consideration the disparity in rates was too great to be justified by that condition, was reversed by this court, not because the Circuit Court had no jurisdiction to consider the evidence, and thereupon to affirm the validity of the order of the commission, but because that issue was not actually before the court, and that no testimony had been adduced by either party on such an issue; and it was said that the language of the act, authorizing the court to hear and determine the matter as a case of equity, "necessarily implies that the court is not concluded by the findings or conclusions of the commission."

Accordingly our conclusion is that it was competent, in the present case, for the Circuit Court, in dealing with the issues raised by the petition of the commission and the answers thereto, and for the Circuit Court of Appeals on the appeal, to determine the case upon a consideration of the allegations of the parties, and of the evidence adduced in their support; giving effect, however, to the findings of fact in the report of the commission, as prima facie evidence of the matters therein stated.

It has been uniformly held by the several Circuit Courts and the Circuit Courts of Appeals, in such cases, that they are not restricted to the evidence adduced before the commission, nor to a consideration merely of the power of the commission to make the particular order under question, but that additional evidence may be put in by either party, and that the duty of the court is to decide, as a court of equity, upon the entire body of evidence.

Coming at last to the questions of fact in this case, we encounter a large amount of conflicting evidence. It seems undeniable, as the effect of the evidence on both sides, that an actual dissimilarity of circumstances and conditions exists between the cities concerned, both as respects the volume of their respective trade, and the competition, affecting rates, occasioned by rival routes by land and water. Indeed, the commission itself recognized such a state of facts, by making an allowance in the rates prescribed for dissimilarity resulting from compe-



tion; and it was contended on behalf of the commission, both in the courts below and in this court, that the competition did not justify the discriminations against Troy to the extent shown, and that the allowance made therefor by the commission was a due allowance.

The issue is thus restricted to the question of the preponderance of the evidence on the respective sides of the controversy. We have read the evidence disclosed by the record, and have endeavored to weigh it with the aid of able and elaborate discussions by the respective counsel.

No useful purpose would be served by an attempt to formally state and analyze the evidence, but the result is that we are not convinced that the courts below erred in their estimate of the evidence, and that we perceive no error in the principles of law on which they proceeded in the application of the evidence.

The decree of the Circuit Court of Appeals is accordingly affirmed.  
Mr. Justice HARLAN, dissenting.

#### NOTE.

Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), § 16: "Whenever any common carrier, as defined in and subject to the provisions of this act, shall violate or refuse or neglect to obey any lawful order or requirement of the commission in this act named. It shall be the duty of the commission, and lawful for any company or person interested in such order or requirement, to apply, in a summary way, by petition, to the Circuit Court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants, in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition, and on such hearing the report of said commission shall be prima facie evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said commission, and enjoining obedience to the same."

This provision was changed by Act June 29, 1906, c. 3591, § 5, 34 Stat. 591 (U. S. Comp. St. Supp. 1909, p. 1161), as follows: "\* \* \* If any carrier fails or neglects to obey any order of the commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the commission in its own name, may apply to the Circuit Court \* \* \* for an enforcement of such order. Such application shall be by petition, which shall \* \* \* be served upon the carrier, \* \* \* and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue, or which may arise upon the hearing of such petition. If upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same,



the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise, \* \* \* and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to it by writs of injunction and mandamus. From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determination over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from. The venue of suits brought in any of the Circuit Courts of the United States against the commission to enjoin, set aside, annul or suspend any order or requirement of the commission shall be in the district where the carrier \* \* \* has its principal operating office and may be brought at any time after such order is promulgated. \* \* \* No injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the commission shall be granted except on hearing after not less than five days' notice to the commission. An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States."

See, also, the provision from the act of 1906 set forth in the passage next quoted.

"In consequence of one of the comprehensive amendments to the act to regulate commerce, adopted in 1906 (Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 [U. S. Comp. St. Supp. 1909, p. 1158]), it is now provided that 'all orders of the commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the commission, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction.' The statute endowing the commission with large administrative functions, and generally giving effect to its orders concerning complaints before it without exacting that they be previously submitted to judicial authority for sanction, it becomes necessary to determine the extent of the powers which courts may exert on the subject. Beyond controversy, in determining whether an order of the commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 698, 15 Sup. Ct. 268, 360, 39 L. Ed. 311, 316, 5 Interst. Com. Rep. 1. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised." *Interstate Commerce Commission v. Illinois Cent. R. Co.*, 215 U. S. 452, 469, 470, 30 Sup. Ct. 155, 160, 54 L. Ed. 280 (1910).

"There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates con-

trary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Interstate Commerce Commission v. Illinois C. R. Co.*, 215 U. S. 470, 30 S. Ct. 155, 54 L. Ed. 287 (1910); *Southern P. Co. v. Interstate Commerce Commission*, 219 U. S. 433, 31 S. Ct. 288, 55 L. Ed. 283 (1911); *Interstate Commerce Commission v. Northern P. R. Co.*, 216 U. S. 544, 30 S. Ct. 417, 54 L. Ed. 609 (1910); *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 146, 174, 18 S. Ct. 45, 42 L. Ed. 414, 425 (1897).<sup>\*</sup> *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U. S. 541, 547, 32 S. Ct. 108, 110, 111 (56 L. Ed. 308) (1912).

"The relator argues, in support of the power of the Appellate Division to review generally the reasonableness of the order of the Public Service Commission that the necessary authority is given by the provision with regard to the writ of certiorari contained in section 2140 of the Code of Civil Procedure.\* That section reads as follows:

"Sec. 2140. The questions, involving the merits, to be determined by the court upon the hearing, are the following, only:

"1. Whether the body or officer had jurisdiction of the subject-matter of the determination under review.

"2. Whether the authority, conferred upon the body or officer, in relation to that subject-matter, has been pursued in the mode required by law, in order to authorize it or him to make the determination.

"3. Whether, in making the determination, any rule of law, affecting the rights of the parties thereto, has been violated, to the prejudice of the relator.

"4. Whether there was any competent proof of all the facts, necessary to be proved, in order to authorize the making of the determination.

"5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence of any of those facts, that the verdict of a jury, affirming the existence thereof, rendered in an action in the Supreme Court, triable by a jury, would be set aside by the court, as against the weight of evidence."

"I do not understand that this section of the Code extends the power of the court beyond the rules laid down in *State v. Great Northern Ry. Co.*, 130 Minn. 57, 153 N. W. 247, Ann. Cas. 1917B, 1201 (1915), and *Interstate Com. Comm. v. Illinois Central R. R. Co.*, supra."† *People ex rel. New York & Queens Gas Co. v. McCall*, 219 N. Y. 84, page 89, 113 N. E. 795, 796, Ann. Cas. 1916E, 1042 (1916).

"This interpretation of the statutes of New York is conclusive, and the definition, thus announced, of the power of the courts of that state to review the decision of the Public Service Commission, based as it is in part on the decision in *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452, 470, 30 S. Ct. 155, 54 L. Ed. 280 (1910), differs but slightly, if at all, from the definition by this court of its own power to review the decisions of similar administrative bodies, arrived at in many cases in which such decisions have been under examination. Typical cases are: *Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481-494, 30 S. Ct. 164, 54 L. Ed. 292 (1910); *Kansas City Southern Co. v. United States*, 231 U. S. 423, 443, 444, 34 S. Ct. 125, 58 L. Ed. 296, 52 L. R. A. (N. S.) 1 (1913); *Louisiana R. R. Commission v. Cumberland Tel. & Tel. Co.*, 212 U. S. 414, 420-422, 29 S. Ct. 357, 53 L. Ed. 577 (1909); *Interstate Commerce Commission v. Union Pac. Railroad Co.*, 222 U. S. 541-547, 32 S. Ct. 108, 56 L. Ed. 308 (1912); and *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655, 668, 32 S. Ct. 389, 56 L. Ed. 594 (1912).

"It is the result of these and similar decisions that, while in such cases as we have here this court is confined to the federal question involved and therefore has not the authority to substitute its judgment for that of an administrative commission as to the wisdom or policy of an order complained of, and will not analyze or balance the evidence which was before the Commission for the purpose of determining whether it preponderates for or against the conclusion arrived at, yet it will, nevertheless, enter upon such an examination of the rec-

\* Now Civil Practice Act, § 1304.

† See supra, this note.

ord as may be necessary to determine whether the federal constitutional right claimed has been denied, as, in this case, whether there was such a want of hearing or such arbitrary or capricious action on the part of the Commission as to violate the due process clause of the Constitution." *People of State of New York ex rel. New York & Queens Gas Co. v. McCall*, 245 U. S. 345, 348, 38 S. Ct. 122, 123, 62 L. Ed. 337 (1917).

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6- OHIO VALLEY WATER CO. v. BEN AVON BOROUGH. *wont take*

Supreme Court of the United States, 1920. 253 U. S. 287, 40 S. Ct. 527, 64 L. Ed. 908.

See post, p. 695, for a report of the case.

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75- FEDERAL TRADE COMMISSION v. CURTIS PUB. CO.

Supreme Court of the United States, 1923. 260 U. S. 568, 43 S. Ct. 210, 67 L. Ed. 408.

Complaint by the Federal Trade Commission against the Curtis Publishing Company. An order of the Commission requiring the company to desist from entering into certain contracts or enforcing certain provisions of outstanding contracts was set aside by the Circuit Court of Appeals (270 F. 881), and the Commission brings certiorari. Affirmed.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

The court below entered a decree setting aside an order of the Trade Commission, dated July 21, 1919, which directed respondent Publishing Company to cease and desist from entering into or enforcing agreements prohibiting wholesalers from selling or distributing the magazines or newspapers of other publishers. (C. C. A.) 270 F. 881. And the cause is here by certiorari.

The commission issued an original complaint July 5, 1917, based mainly on a restrictive clause in existing contracts with so-called district agents. Thereafter respondent changed its agreement. An amended complaint followed, which amplified the original allegations and attacked the second contract and consequent conditions.

The first section of the amended complaint declares there is reason to believe that respondent has been and is using unfair methods of competition contrary to section 5, Act of Congress approved September 26, 1914, c. 311, 38 Stat. 717 (Comp. St. §§ 8836a-8836k),<sup>8</sup> and specifically charg-

<sup>8</sup> Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and



es: That respondent, a Pennsylvania corporation with principal place of business at Philadelphia, has long engaged in publishing, selling and circulating weekly and monthly periodicals in interstate commerce. That with intent, purpose and effect of suppressing competition in the publication, sale and circulation of periodicals it now refuses and for some months past has refused to sell its publications to any dealer who will not agree to refrain from selling or distributing those of certain competitors to other dealers or distributors. That with the same intent, purpose and effect it is making and for several months last past has made contracts with numerous wholesalers to distribute its periodicals as agents, and not to distribute those of other publishers without permission. That wholesalers so restricted are the principal and often the only medium for proper distribution of weekly and monthly periodicals in various localities

serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. \* \* \* If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. \* \* \*

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the Circuit Court of Appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. \* \* \*

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said Circuit Court of Appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.—[*Note by judge.*]



throughout the United States, and many of the so-called agents formerly operated under contracts with respondent which abridged their liberty of resale.

The second section declares there is reason to believe respondent is violating section 3, Act of Congress approved October 15, 1914 (Clayton Act) c. 323, 38 Stat. 730,<sup>9</sup> and specifically charges: That respondent publishes, sells and circulates weekly and monthly periodicals in interstate commerce. That for some months past, in such commerce, it has sold and is now selling and making contracts for the sale of its publications and periodicals for use and resale and is fixing the price charged on condition, agreement or understanding that the purchaser shall not sell other publications or periodicals, thereby substantially lessening competition and tending to create a monopoly.

Respondent replied to the notice to show cause why it should not be required to desist "from the violations of law charged in this complaint." It denied unlawful conduct and claimed that the parties contracted with as agents were such in fact; that their services were necessary for the maintenance of the plan originated by it of distributing publications through school boys, who require special superintendence; and further, that such agents had lawfully agreed to abstain from other connections and devote their time and attention to superintending the boys and to the general upbuilding of sales. Copies of respondent's first and second agreements with distributors accompanied the answer. The first had then been superseded and largely discontinued.

The second contract provides that upon requisition respondent will consign its publications to the agent as he may require, retaining title until they are sold; that the agent will supply the demand of boys and dealers at specified prices, and will use reasonable efforts and devote all necessary time to promoting the sales of such publications; "that without the written consent of the publisher he will not display, deliver, or sell any copies of any one of said publications before the authorized publication date, as specified in the printed requisition blanks, or dispose of any copies of said publications in the territory of any other district agent or special

<sup>9</sup> Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Comp. St. § 8835c.

Section 11 (Comp. St. § 8835j) authorizes the Trade Commission to enforce section 3, with certain exceptions, and directs that this shall be done as prescribed by the act establishing the commission, *supra*, with like power of review in the courts.—[*Note by judge.*]

agent of the publisher, or *act as agent for or supply at wholesale rates any periodicals other than those published by the publisher*, or directly or indirectly furnish to any other publisher or agent the names and addresses of the persons to whom the publisher's publications are sold or delivered;" that subject to the principal's direction and control the agent shall train, instruct and supervise an adequate force of boys for distributing the publications; and that he will return unsold copies, their cover pages or headings.

After taking much testimony—2,500 pages—the commission made a brief and rather vague report of 2 pages, containing findings and conclusions based on the second contract with dealers and without direct reference to the earlier one. The substance of the report follows:

Paragraph 1: Respondent, a Pennsylvania corporation with principal place of business at Philadelphia, is engaged in publishing, selling and distributing weekly and monthly periodicals among the states.

Paragraph 2: "That in the course of such commerce, the respondent has entered into contracts with certain persons, partnerships, or corporations to sell or distribute its magazines by the terms of which contracts, such persons, partnerships, or corporations, have agreed, among other things, *not to 'act as agent for or supply at wholesale rates, any periodicals other than those published by the publisher'* <sup>10</sup>—*the respondent herein—without the written consent of such publisher, that of such persons, partnerships, or corporations, approximately four hundred forty-seven (447), hereinafter referred to as 'dealers,' are and previous to entering into such contracts with respondent were regularly engaged in the business of wholesale dealers in newspapers or magazines, or both and as such are as aforesaid engaged in the sale or distribution of magazines, or newspapers, or both, of other publishers; that many of said four hundred forty-seven (447) dealers, and many others who have become such wholesale dealers since entering into such contracts, bound by said contract provisions as aforesaid, have requested respondent's permission to engage also in the sale or distribution of certain publications competing in the course of said commerce, with those of respondent, which permission as to said competing publications has been uniformly denied by respondent; that in enforcing said contract provision as to said dealers, and in denying them said permission, respondent has prevented and now prevents certain of its competitors from utilizing established channels for the general distribution or sale of magazines or newspapers, or both, of different and sundry publishers; that such established channels are in most instances the principal and most efficient, and in numerous cases, the only medium for the distribution of such publications in the various localities of the United States; that such method of competition so employed by respondent in the course of such commerce, as aforesaid, has proved and is unfair."*

<sup>10</sup> These words are quoted from the second contract.—[Note by judge.]

Paragraph 3: "That in the course of such commerce, the respondent has made sales of its magazines to, or entered into contracts for the sale of the same with certain persons, partnerships, or corporations, by the terms of which sales or contracts for such sales, such persons, partnerships, or corporations have agreed, among other things" [here follow, without material change, the words of paragraph 2 printed supra in italics]. That the effect of said contract provision has been, and is, to substantially lessen competition with respondent's magazines and tends to create for the respondent a monopoly in the business of publishing magazines of the character of those published by respondent."

The commission concluded that the method of competition described in paragraph two of the report violates section 5, Act of September 26, 1914, and that the acts and conduct specified in the third paragraph violate section 3, Act of October 15, 1914. And it thereupon ordered: That the respondent cease and desist, while engaged in interstate commerce, from entering into any contracts, agreements or understandings which forbid persons, partnerships or corporations already engaged in the sale or distribution of magazines or newspapers, or both, of other publishers from acting as agents for, selling or supplying to others at wholesale rates periodicals other than respondent's without its consent; from contracting with those already engaged in the sale or distribution of magazines or newspapers, or both, of other publishers, forbidding them from selling or distributing or continuing to sell or distribute the same; and from enforcing any provision of an outstanding contract whereby one now engaged in the sale or distribution of magazines or newspapers, or both, of other publishers, is forbidden to sell or distribute the same without respondent's permission.

The statute provides (section 5) that when the commission's order is duly challenged it shall file a transcript of the record, and thereupon the court shall have jurisdiction of the proceedings and the question determined therein and shall have power to make and enter, upon the pleadings, testimony and proceedings, a decree affirming, modifying or setting aside the order; but the commission's findings as to the facts, if supported by evidence, shall be conclusive. The court is also empowered to order the taking of additional evidence for its consideration.

We have heretofore pointed out that the ultimate determination of what constitutes unfair competition is for the court, not the commission; and the same rule must apply when the charge is that leases, sales, agreements or understandings substantially lessen competition or tend to create monopoly. *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427, 40 S. Ct. 572, 64 L. Ed. 993.

Manifestly, the court must inquire whether the commission's findings of fact are supported by evidence. If so supported, they are conclusive. But as the statute grants jurisdiction to make and enter, upon the pleadings, testimony and proceedings, a decree affirming, modifying or setting aside an order, the court must also have power to examine the whole rec-



Lord and ascertain for itself the issues presented and whether there are material facts not reported by the commission. If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be remanded to the commission—the primary fact-finding body—with direction to make additional findings, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay, the court has full power under the statute so to do. The language of the statute is broad and confers power of review not found in the Interstate Commerce Act (24 Stat. 379). *Louisville & Nashville Railroad Co. v. Behlmer*, 175 U. S. 648, 675, 676, 20 S. Ct. 209, 44 L. Ed. 309, *Interstate Commerce Commission v. Clyde Steamship Co.*, 181 U. S. 29, 32, 21 S. Ct. 512, 45 L. Ed. 729, and *Interstate Commerce Commission v. Chicago, Burlington & Quincy Railroad Co.*, 186 U. S. 320, 340, 22 S. Ct. 824, 46 L. Ed. 1182, while helpful as to proper practice, do not determine the present problem.

Here we find a vague general complaint charging unfair methods of competition and also sales and contracts for sales on condition that the purchaser shall not deal in other publications. This is followed by an answer setting out the original agreement with dealers and also the substituted form. The findings of fact make no reference whatever to the first agreement, but do show that respondent had entered into the second (quoting its language) with “certain” (no number is given, but there were 1,535) persons, partnerships and corporations, approximately 447 of whom before making such contracts were wholesale dealers in newspapers and magazines. Further, that many of this 447, as well as other parties to such contracts, have been denied permission to distribute the periodicals of other publishers. And that in these ways the most efficient established channels of distribution have been closed to competitors, competition lessened and a tendency to monopoly established.

The present record clearly discloses the development of respondent’s business, how it originated the plan of selling through schoolboys, the necessity for exclusive agents to train and superintend these boys and to devote their time and attention to promoting sales, and also contracts with 1,535 such agents. The commission’s report suggests no objection as to 1,088 of these representatives who, prior to their contracts, had not been engaged in selling and distributing newspapers or periodicals for other publishers. There is no sufficient evidence to show that respondent intended to practice unfair methods, or unduly to suppress competition, or to acquire monopoly, unless this reasonably may be inferred from making and enforcing the second or substituted agreement with many important wholesale dealers throughout the country.

Judged by its terms, we think this contract is one of agency, not of sale upon condition, and the record reveals no surrounding circumstances sufficient to give it a different character. This, of course, disposes of the charges under the Clayton Act.

The engagement of competent agents obligated to devote their time and attention to developing the principal's business, to the exclusion of all others, where nothing else appears, has long been recognized as proper and unobjectionable practice. The evidence clearly shows that respondent's agency contracts were made without unlawful motive and in the orderly course of an expanding business. It does not necessarily follow, because many agents had been general distributors, that their appointment and limitation amounted to unfair trade practice. And such practice cannot reasonably be inferred from the other disclosed circumstances. Having regard to the undisputed facts, the reasons advanced to vindicate the general plan are sufficient.

Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face. The mere selection of competent, successful and exclusive representatives in the orderly course of development can give no just cause for complaint, and, when standing alone, certainly affords no ground for condemnation under the statute.

In the present cause the commission has not found all the material facts, but considering those which it has found and the necessary effect of the evidence, the order to desist is clearly wrong and should be set aside without further delay.

Affirmed.

Mr. Chief Justice TAFT, doubting.

The sentence in the majority opinion, which makes me express doubt, is that discussing the duty of the court in reviewing the action of the Federal Trade Commission when it finds that there are material facts not reported by the commission. The opinion says:

"If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be remanded to the commission—the primary fact-finding body—with directions to make additional findings, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without delay, the court has full power under the statute so to do."

If this means that, where it clearly appears that there is no substantial evidence to support additional findings necessary to justify the order of the commission complained of, the court need not remand the case for further findings, I concur in it. It is because it may bear the construction that the court has discretion to sum up the evidence pro and con on issues undecided by the commission, and make itself the fact-finding body, that I venture with deference to question its wisdom and correctness. I agree that, in the further discussion of the evidence, the reasoning of the opinion of the court would seem to justify the view that it does not find in the evidence sufficient to support additional findings by the commission justifying its order. I only register this doubt because I think it of high

importance that we should scrupulously comply with the evident intention of Congress that the Federal Commission be made the fact-finding body and that the court should in its rulings preserve the board's character as such, and not interject its views of the facts where there is any conflict in the evidence.

I am authorized to say that Mr. Justice BRANDEIS concurs with me in this.

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2- ROBINSON v. BALTIMORE & O. R. CO.

Supreme Court of the United States, 1912. 222 U. S. 506, 32 S. Ct. 114, 56 L. Ed. 288.

In Error to the Supreme Court of Appeals of the State of West Virginia to review a judgment which affirmed a judgment of the Circuit Court of Marion County, in that state, dismissing an action by a shipper to recover from a carrier the excess which he claims to have paid under a rate attacked as unjustly discriminatory. Affirmed.

See same case below, 64 W. Va. 406, 63 S. E. 323.

The facts are stated in the opinion.

Mr. Justice VAN DEVANTER delivered the opinion of the court.

In February, March, and May, 1903, Robinson, the plaintiff in error, shipped eleven carloads of coal from Fairmont, West Virginia, to points in other states over the railroad of the Baltimore & Ohio Railroad Company, the defendant in error, and paid the rate thereon which was prescribed in a schedule published and filed conformably to the act to regulate interstate commerce, and then in full force. By this schedule the rate was 50 cents more per ton when the coal was loaded into the car from wagons than when the loading was from a tippie. Robinson's shipments came under the higher rate, and the charges paid by him were \$150 in excess of what would have been exacted if his coal had been loaded from a tippie. Conceiving that the schedule unjustly discriminated between shipments loaded from tipples and those loaded from wagons, he brought, in the circuit court of Marion county, West Virginia, on April 19, 1906, an action against the railroad company to recover the excess so paid. The case was heard upon an agreed statement of facts, which set forth, with some detail, the matters just stated, and recited that it embodied "all the facts and evidence in the cause." But the statement did not disclose, or even suggest, that the schedule had been the subject of a complaint to the Interstate Commerce Commission, or had been found by the Commission to be unjustly discriminatory, or that the railroad company had been ordered by the Commission to desist from giving effect to the schedule, or to make reparation to Robinson or any other shipper because of prior exactions thereunder. Being of opinion that, upon the agreed statement, Robinson was not entitled to recover, the court entered a judgment dismissing his action, and that judgment was affirmed by the su-



preme court of appeals of the state. 64 W. Va. 406, 63 S. E. 323. He then sued out this writ of error upon the ground that, by the judgment of affirmance, he was denied rights specially set up under the act to regulate interstate commerce.

The first question to be considered is whether, consistently with the provisions of that act, Robinson could maintain his action for reparation in the absence of an order by the Interstate Commerce Commission finding that the established schedule whereby the additional 50 cents per ton was exacted was unjustly discriminatory, determining what reparation should be made because of prior exactions thereunder, and directing the carrier to desist from such discrimination in the future, and to make the reparation indicated. It was contended by him in the supreme court of appeals of the state, and is contended now, that the question should be answered in the affirmative because of the provision in § 22 that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." But it must be ruled otherwise, and for these reasons:

The act (chapter 104, 24 Stat. 379, U. S. Comp. Stat. 1901, p. 3154; chapter 382, 25 Stat. 855, U. S. Comp. Stat. 1901, p. 3158; chapter 61, 28 Stat. 643, U. S. Comp. Stat. 1901, p. 3171; chapter 708, 32 Stat. 847, U. S. Comp. Stat. Supp. 1909, p. 1138), whilst prohibiting unreasonable charges, unjust discriminations, and undue preferences by carriers subject to its provisions, also prescribed the manner in which that prohibition should be enforced; that is to say, the act laid upon every such carrier the duty of publishing and filing, in a prescribed mode, schedules of the rates to be charged for the transportation of property over its road, declared that the rates named in schedules so established should be conclusively deemed to be the legal rates until changed as provided in the act, forbade any deviation from them while they remained in effect, invested the Interstate Commerce Commission with authority to receive complaints against rates so established, and to inquire and find whether they were in any wise violative of the prohibitions of the act, and, if so, what, if any, injury had been done thereby to the person complaining or to others, and further authorized the Commission to direct the carrier to desist from any violation found to exist, and to make reparation for any injury found to have been done. Provision was also made for the enforcement of the order for reparation by an action in the circuit court of the United States if the carrier failed to comply with it.

Thus, for the purpose of preventing unreasonable charges, unjust discriminations, and undue preferences, a system of establishing, maintaining, and altering rate schedules and of redressing injuries resulting from their enforcement was adopted whereby publicity would be given to the rates, their application would be obligatory and uniform while they remained in effect, and the matter of their conformity to prescribed standards would be committed primarily to a single tribunal clothed

with authority to investigate complaints and to order the correction of any nonconformity to those standards by an appropriate change in schedules and by due reparation to injured persons.

When the purpose of the act and the means selected for the accomplishment of that purpose are understood, it is altogether plain that the act contemplated that such an investigation and order by the designated tribunal, the Interstate Commerce Commission, should be a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule alleged to be violative of the prescribed standards. And this is so, because the existence and exercise of a right to maintain an action of that character, in the absence of such an investigation and order, would be repugnant to the declared rule that a rate established in the mode prescribed should be deemed the legal rate, and obligatory alike upon carrier and shipper until changed in the manner provided, would be in derogation of the power expressly delegated to the Commission, and would be destructive of the uniformity and equality which the act was designed to secure.

In the case of *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440, 51 L. Ed. 553, 558, 27 S. Ct. 350, 9 Ann. Cas. 1075, where such a right was asserted and denied, it was said by this court:

"Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with the power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance, and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

It is true, as was urged in argument, that in that case the complaint against the established rate was that it was unreasonable, while here the complaint is that the rate was unjustly discriminatory. But the distinction is not material. The power of the Commission over the two complaints is the same,—one is as likely to become the subject of diverging opinions and conflicting decisions as is the other; and if a court, acting originally upon either, were to sustain it and award reparation, the confusing anomaly would be presented of a rate being adjudged to be violative of the prescribed standards, and yet continuing to be the legal rate, obligatory upon both carrier and shipper.

Of course, the provision in § 22, as also the provision in § 9, must be read in connection with other parts of the act, and be interpreted with due regard to its manifest purpose; and, when that is done, it is apparent that neither provision recognizes or implies that an action for reparation, such as is here sought, may be maintained in any court, Federal or state, in the absence of an appropriate finding and order of the Commission. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, supra [204 U. S.], pages 442, 446. \* \* \*

It follows that the judgment must be affirmed; and it is so ordered.

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BAER BROTHERS MERCANTILE CO. v. DENVER & R.  
G. R. CO.

Supreme Court of the United States, 1914. 233 U. S. 479, 34 S. Ct. 641, 58 L. Ed. 1055.

Mr. Justice LAMAR delivered the opinion of the court.<sup>11</sup>

In proceedings before the Commerce Commission the plaintiff secured an order requiring the defendant to pay it \$3,438.27 as reparation for unreasonable freight rates charged and collected, the fixing of a new and just rate being left for future decision. The carrier failed to make the payment required, and the plaintiff thereupon brought suit and recovered judgment for the sum awarded, together with interest and attorneys' fees. This judgment was reversed by the circuit court of appeals, which held that the order was void on its face, and could not be the basis of a recovery for the reason that, while reparation had been awarded on the ground that the old rate was unreasonable, the Commission had not fixed a new and just rate for the future.

1. That the two subjects of reparation and rates may be dealt with in one order is undoubtedly true. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 446, 51 L. Ed. 561, 27 S. Ct. 350, 9 Ann. Cas. 1075; *Robinson v. Baltimore & O. R. Co.*, 222 U. S. 509, 56 L. Ed. 289, 32 S. Ct. 114. But awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature private and the other public. One is made by the

<sup>11</sup> The statement of facts is omitted.



Commission in its quasi judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi legislative capacity, to prevent future injury to the public. But testimony showing the unreasonableness of a past rate may also furnish information on which to fix a reasonable future rate, and both subjects can be, and often are, disposed of by the same order. This, however, is not necessarily so. Indeed, under the original commerce act, the two matters could not possibly be combined in a single order for the reason that, while at that time the Commission could order the carrier to desist from unreasonable practices and award damages, it could not fix rates. This brought about an anomalous state of affairs. For if the shipper obtained his order of reparation because of unreasonable charges which the railroad company was ordered to discontinue, a slightly different, but still unreasonable, rate might be put in for the future, which the shipper had to pay and again institute proceedings for reparation. 24 Stat. 384, § 15, c. 104, U. S. Comp. Stat. 1901, p. 3165.

2. This situation was dealt with by the Hepburn Act, which, in addition to the existing power to make reparation, conferred upon the Commission the new power to make rates for the future. But the two matters were treated as different subjects and were dealt with in separate sections. Section 4 conferred the power of making rates. Section 5 gave the Commission power to make reparation orders. 34 Stat. 589, 590, §§ 4, 5, c. 3591, U. S. Comp. Stat. Supp. 1911, pp. 1297, 1301. Not only were the two functions separately treated, but an analysis of the act shows that there is no such necessary connection between them as to make the quasi judicial order for reparation depend for its validity upon being joined with a quasi legislative order fixing rates. Persons entitled to one may have no interest in the other. Persons interested in both may be entitled to reparation, and not to a new rate; or to a new rate, and not to reparation. For example, § 13 permits "any mercantile, agricultural, or manufacturing society or any body politic or municipal organization to make complaints against the carrier." On the application of such bodies, old rates might be declared unjust and new rates established; but, of course, no reparation would be given, for the reason that such complainants were not shippers, and therefore not entitled to an award of pecuniary damages. Cf. *Louisville & N. R. Co. v. Interstate Commerce Commission*, 227 U. S. 89, 57 L. Ed. 431, 33 S. Ct. 185. Then, too, there are cases in which a rate, reasonable when made, becomes unreasonable as the result of a gradual change in conditions, so that no reparation is ordered even though a new rate be established for the future. *Anadarko Cotton Oil Co. v. Atchison, T. & S. F. R. Co.*, 20 Inters. Com. Rep. 43. Conversely, there may be cases where what was an unreasonable rate in the past is found to be reasonable at the date of the hearing. In such a case reparation would be awarded for past unreasonable charges collected, but no new rate would be established for the future.

3. It may, however, be said that even in such a case, the order, while condemning the rate for the past, should contain a provision validating it for the future. But while this consideration might show that it was erroneous not to name the new rate, it would not follow that the order awarding reparation was void. The Hepburn Act treats the two subjects as related, but independent. The grounds of complaint may be joint or separate, and the very fact that they may sometimes be separate shows that the presence of both is not jurisdictional, and that the absence of a provision for one need not operate to invalidate an order as to the other.

This conclusion is strengthened by considering the hardships that would result from nullifying a reparation order for error in omitting a provision for the future rate. It would punish the shipper for the failure of the Commission. It would deprive him of his award of damages for his private injury, because of the Commission's omission to make a rate for the benefit of the public. The shipper might or might not intend to remain in business. He might or he might not be interested in future rates. He might have been able to prove unreasonableness as to the past without being able to furnish evidence as to what would be reasonable for the future. Or, the Commission might be in position to say with certainty that the rates had been unreasonable, and award reparation accordingly, but it might require a protracted and lengthy hearing to establish what would be just for the future. To make the shipper wait on such a finding, and deprive him of his present right to reparation, until the determination of an independent question, would work a hardship not contemplated by the act and not required by any of its provisions.

The present case illustrates some of these features. The plaintiff's petition asked for reparation and that the Commission would establish just rates. On the hearing it appeared that there was no through route or joint rate, and that the established local charge of one of the carriers was just while that of the other had not been established or included in a filed tariff and was also unjust. The evidence was sufficient to sustain a finding of damages against such carrier, but it did not show how the through rate should be divided between the two companies, one of which hauled 923 miles and the other 160 miles. The carriers did not ask for an extension of the time within which the reparation should be paid. The fact that they were given an opportunity to agree on a through rate and how it should be divided ought not to deprive plaintiff of its rights to damages for the past, under a reparation order which could not, by any possibility, be changed by any subsequent finding as to rates for the future. \* \* \*

The judgment of the Circuit Court of Appeals is reversed and that of the Circuit Court affirmed.

## 10- ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION (1916), p. 75.

## REPARATION.

By the amendments of 1906 to the act the Commission was first given power to really regulate rates or to prescribe a reasonable maximum rate for the future. During the year covered by our annual report submitted in December, 1906, 82 formal cases and investigations were instituted and 1,002 informal complaints were received. During the year covered by this report 878 formal cases and investigations were instituted, 6,040 cases were considered on the special docket, and 4,939 informal complaints were received and given attention. The cases on the special docket involve no principle except the payments of reparation. The same is true as to the great majority of the informal complaints and a very large number of the formal complaints.

The ideas originally had as to awards of reparation and the showing which complainant must make in order to be entitled to an award of reparation have been substantially modified in recent years, especially with regard to reparation because of undue preference, undue prejudice, or unjust discrimination. The Supreme Court of the United States has held that in a discrimination case the damage to complainant, if any, may be exactly equal to the difference between the rates paid by the complainant and those paid by his competitor; it may be more and it may be substantially less; but whatever it is, he must prove his damage with the same degree of certainty that would justify a judgment in court: *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184, 33 S. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315. With respect to reparation because of the payment of a rate that is unreasonable per se, the Commission has followed the rule that the measure of damages is the difference between the rate paid and that which would have been paid under the reasonable rate, and has declined to go beyond the parties to the transportation contract in an effort to prove or disprove that the complainant was damaged. There are many who argue that this policy is erroneous and that with regard to proof of damage there is and should be no distinction between the discrimination case and the case of an unreasonable rate. Counsel for the carriers argue that if the shipper has paid a rate that is later found to have been unreasonable, but has conditioned his commercial transactions in the light of and on the basis of the rate paid he has passed along to his vendees any damage that he might have sustained and is therefore not entitled to reparation.

The idea in authorizing the Commission to award reparation apparently was to afford a direct and inexpensive way for the complainant to secure a decision on that point. The Commission's award of reparation is, of course, not binding upon the carrier; it is only prima facie evidence in court, and if the carrier is unwilling to pay the



reparation so awarded, the claimant must seek his remedy by suit in court.

During somewhat recent years numerous agencies have been established in different parts of the country whose principal or sole business is to secure from shippers or consignees their paid freight bills and power of attorney to bring complaints in the name of the one from whom such bills are secured. Usually an agreement is entered into that whatever reparation is recovered will be divided on a percentage basis, but in some instances expense bills are purchased outright for insignificant sums. Wherever it is thought that there is any prospect of securing an award of reparation, complaint is brought before the Commission, which necessitates hearing, decision, and preparation and printing of a report. The number of such cases is very large, and it is undoubtedly true that if it were not for the hope of securing reparation a majority of the complaints filed would not be presented.

In connection with the question of reparation on account of an unreasonable rate charged it should be borne in mind that the standard of reasonableness under our act is not a definite fixed standard. That is to say, whether a certain rate is reasonable or not often can not be known by the carrier until the Commission has passed upon it. Now, in seeking reparation on account of an unreasonable rate, complainants frequently invoke the common law in support of their claims, but we have been referred to no common-law case where the standard exceeded by the carrier was not a fixed definite standard which the carrier knew and was bound to observe. The act contemplates that we shall find rates reasonable or unreasonable according to whether, in our opinion, the rate bears a proper relation to the service rendered. But this is preeminently a question upon which opinions of the Commission and of the carriers may differ, and the act contemplates an original exercise of the carriers' judgment.

As stated, the cases that are handled on our special docket involve no question except payment of reparation. They are all cases in which the carrier admits the unreasonableness of the charge and consents to pay the reparation. If we had no power to award reparation, a mass of cases which now require consideration and decision, with all their attendant detail work and expense, would be kept off the Commission's dockets. If we had no power to award reparation, but continued to exercise the power and perform the duties of determining what was, is, or will be the reasonable maximum rate, and if the rate were found to be unreasonable the date upon which it became unreasonable, and whether or not there was or is undue preference, undue prejudice, or unjust discrimination, and if so, the extent thereof, it is probable that such finding would have as much force in court as if it were supplemented by a specific finding as to the damage sustained by complainant. Under such a plan the rights of the parties would be judicially determined just as they now are in cases in which the carrier is unwilling to pay the reparation awarded by the Commission.

REPORT OF INTERSTATE COMMERCE COMMISSION  
(1921), p. 58.

SUMMARY OF RECOMMENDATIONS.

5. That the power to award reparation be placed wholly in the courts; that a condition precedent to an award of reparation by a court for unreasonable rates or charges be that we have found such rates or charges unreasonable as of a particular time; that the law affirmatively recognize that private damages do not necessarily follow a violation of the act; that provision be made that sections 8, 9, and 16 of the Interstate Commerce Act shall be construed to mean that no person is entitled to reparation except to the extent that he shows he has suffered damage; and that the law should provide that if a rate is found to be unreasonable the rule of damages laid down in the International Coal Case, 230 U. S. 184, 33 S. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, should control.<sup>12</sup>

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SECTION 2.—THE ADMINISTRATIVE ORDER—ITS QUASI  
LEGISLATIVE ASPECT (QUESTION OF POWER  
TO SPECIFY)

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ECKHARDT v. CITY OF BUFFALO.

Supreme Court of New York, Appellate Division, Fourth Department, 1897. 19 App. Div. 1, 46 N. Y. Supp. 204.

GREEN, J. By section 237 of the city charter "the commissioner shall have full power to enforce and carry out all ordinances, rules and regulations for the preservation of the public health, \* \* \* and in case any business or practice is dangerous or detrimental to the public

<sup>12</sup> As to awards under Workmen's Compensation Acts, see *Grand Trunk Western Ry. Co. v. Industrial Commission*, 291 Ill. 167, 125 N. E. 748 (1919).

"The committee of arbitration and the Industrial Commission are administrative bodies and have no judicial functions. *Savoy Hotel Co. v. Industrial Board*, 279 Ill. 329, 116 N. E. 712 (1917). The contention that the act delegates judicial powers to the committee or the commission cannot be sustained. The act is almost automatic in practical working. The amounts to be paid are easy of computation, and the person or persons to whom they shall be paid are fixed and certain. The commission has power to formulate rules and regulations not inconsistent with the provisions of the act and to determine controversies which arise in the administration of the act. If we are correct in our former conclusions that the act affords due process of law and the right of trial by jury has not been violated, then it seems clear that any controversy which may arise concerning the mere administration of the act may be decided in such summary manner as the Legislature shall prescribe. *Cunningham v. Northwestern Improvement Co.*, supra [44 Mont. 180, 119 P. 554 (1911)]; *Hunter v. Colfast Consolidated Coal Co.*, 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L. R. A. 1917D, 15, Ann. Cas. 1917E, 803 (1916)."

health, to prohibit the same, and to declare unwholesome grounds, yards, cellars, buildings and other places, stagnant or unwholesome waters, filth and unwholesome matter injurious to health, to be nuisances, and upon so declaring, the commissioner shall have power to abate the same in such manner as he may deem expedient, and the expense may be assessed upon the lands upon or in front of which such nuisances were, or upon the parcels of land benefited by the abatement of the nuisance, as the common council shall direct." Laws 1891, c. 105.

The question for determination is whether, under the general power to declare certain matters and things to be nuisances, and to abate the same in such manner as the official may deem expedient, the power may be implied to cause new erections to be made, new appliances, apparatus, and contrivances to be used, and new improvements to be adopted, all in accordance with supposed scientific principles of sanitation, and to charge the expense, however costly it may be, to the landowner, whether he will or no. The question is not whether the health commissioner had power to cause or order privies to be put into a proper and decent state, if not in that state; but is (whether he has the right or power to force on the landowner the mechanical contrivance of water-closets, with all their requisites and accessories, instead of the privies, which, sufficient as privies, if kept in the condition proper for such conveniences, are on his lands for the purposes of his building there. \* \* \*

Defendant relies upon the cases of *Ex parte Saunders*, 11 Q. B. Div. 191; *Reg. v. Llewellyn*, 13 Q. B. Div. 681; *Reg. v. Wheatley*, 16 Q. B. Div. 34; *St. Luke's Vestry v. Lewis*, 1 Best & S. 865; *Hargreaves v. Taylor*, 3 Best & S. 613. But the statutes under which these decisions were made expressly conferred upon the local authorities the important and extensive powers here claimed to exist by implication from the simple power to abate nuisances. The public health act provided that the local authority should serve on the owner or occupier of the premises on which the nuisance arises a notice requiring him to abate the same within a time specified, and to execute such works and do such things as may be necessary for that purpose. Upon default in complying with the requisitions of the notice, or if the nuisance, although abated, is, in the opinion of the local authority, likely to recur on the same premises, the latter shall complain to a justice, and the justice shall summon such person to appear before a court of summary jurisdiction. The court, if satisfied that the alleged nuisance exists, or that, although abated, it is likely to recur, shall make an order requiring such person to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance, within a time specified in the order, and to do any work necessary for that purpose. A penalty was imposed for noncompliance with the order. Other sections of the statute (which were not involved in any of these decisions) enabled the local authority to require particular things to be erected, by ordering that a sufficient water-closet, earth-closet or privy should be pro-



vided, "and the appeal against an order under those sections is to the central board, who have better capabilities of dealing with the propriety of such orders than the magistrates." *Ex parte Whitchurch*, 6 Q. B. Div. 545. It was held, however, that the order of the magistrates must specify what works and things the owner should execute and do for the purpose of not only abating the nuisance, but also to effectually prevent its recurrence. *Reg. v. Wheatley*, 16 Q. B. Div. 34. \* \* \*

The decision in *Ex parte Whitchurch* has very pertinent application to a case where, as here, no express statutory power has been conferred upon the local sanitary authorities to direct the execution of such works, and to require such things to be done, as they may deem necessary to abate or remove the nuisance and also to effectually prevent its recurrence. (It clearly indicates that, in the absence of any such legislative authority conferred, the acts of the health commissioner in this case were without legal sanction, and constituted a plain usurpation of power.) And a reference to the English act and the decisions thereunder is important for various reasons. No such extensive powers as these existed at common law, and it was therefore deemed necessary or expedient to create and confer them by act of parliament.) (A mere general power to abate nuisances in such manner as the sanitary boards should deem expedient would hardly accomplish the purposes desired, or attain the beneficent objects within the contemplation of the Parliament. Nothing should be left to implication, but ample powers of regulation and direction should be conferred in express terms.) The assumption or usurpation of power by the local authorities upon grounds of supposed expediency or necessity of the case ought not to be sanctioned, but the power should be expressly conferred. The right of landowners to manage, improve, or alter their property and buildings in such manner as they may deem fit and proper ought not to be interfered with or controlled by local officials, except in pursuance of legislative enactment conferring the power and regulating its exercise. The power should not be left to the local board to be exercised, mayhap in a capricious or arbitrary manner, and be summarily executed or enforced, but should be subject to the control and review of other and superior authorities or magistrates, and the landowner should have ample opportunity to be heard.

The conservation of public interests and the people's health and safety must be looked to, but, at the same time private rights of property must be guarded and protected against unwarrantable invasion, and the undue exercise of authority must be restrained within reasonable and proper bounds. These purposes were all intended to be accomplished by the public health act, and proper safeguards were provided for the landowner's protection. The sanitary commissioner has power to do no more than to require the abatement of the nuisance complained of; and, it may be, he may prescribe the particular mode of abating it, if that be the most effectual way of doing it. But

he possesses no absolute power in that regard. Nor does it follow that he may direct important alterations and permanent improvements upon the premises, at a large expense to the owner, not demanded by the actual necessities of the case. There are no words in the charter to justify the contention that the owner of the premises may be required, in addition to abating the cause endangering the public health and safety, to make expensive improvements upon his property to suit the fancy of the official. His duty was, not to order the construction of an entirely new privy, with all its connections and accessories, but simply to see to the amendment of the one existing. No attempt was made on the trial to show that the existing privy could not have been put in such condition for use as not to be a menace to health. The fact that a privy may not conform in all its appointments and accessories to the most approved modes of scientific, sanitary plumbing does not of itself condemn it as a nuisance.

The charter speaks only of abatement of nuisances, and the expense authorized relates to the work and labor necessary for the accomplishment of the purpose of removing or suppressing them, and not to the construction of something entirely new in lieu of the thing whose condition creates the nuisance. The nuisance complained of was the filthy condition of the privy vaults at the time of the determination that they were detrimental to health, but the large expense incurred had no relevancy to the abatement of that nuisance. It was not an incident to the removal of the cause of the nuisance, but, on the contrary, was for entirely new and independent work for the alteration and improvement of the plaintiff's premises. For this we find no authority in the charter. \* \* \* 13

13 English Public Health Act, 1875, § 36: "If a house within the district of a local authority appears to such authority by the report of their surveyor or inspector of nuisances to be without a sufficient water-closet, earth-closet, or privy, and an ashpit furnished with proper doors and coverings, the local authority shall, by written notice, require the owner or occupier of the house, within a reasonable time therein specified, to provide a sufficient water-closet, earth-closet, or privy, and an ashpit furnished as aforesaid, or either of them, as the case may require. If such notice is not complied with, the local authority may, at the expiration of the time specified in the notice, do the work thereby required to be done, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses."

"I take it to be fully established by the evidence before us that the order issued by the defendant proceeds upon the footing that there shall be no privies in their district, that all the privies there shall be turned into water-closets, and that this resolution has been come to before this order was issued, and without reference to the present case. \* \* \* Now, whatever may be the powers given by this act to the local authorities to order water-closets to be provided instead of privies in particular cases in which that alteration may be required, \* \* \* I think that, whatever may be the powers given, upon the true construction of the act, and viewing it in the light most favorable to these defendants, they were bound to exercise their discretion in each particular case, and that it was not competent to them to lay down any such general rule as that upon which the defendants acted, and that in acting upon that rule they have exceeded the powers given to them by the act, and that therefore this order was, in that respect, illegal and void, and that the defendants had not the power to enter upon the premises for the purpose of giving effect to this part of the order." Turner, L. J., in *Tinkler v. Board*

## REG. v. WHEATLEY.

High Court of Justice, Queen's Bench Division, 1885. 16 Q. B. D. 34.

Rule for a certiorari to bring up an order of justices.

The applicant, A. Cowburn, was owner of some dwelling houses in High street, Liversedge, within the district of the Liversedge Local Board, being the urban sanitary authority of the district.

On the 11th of August, 1885, the applicant was served by the inspector of nuisances to the board with the following notice:

"Take notice that under the provisions of the Public Health Act, 1875, the local board for the district of Liversedge, being satisfied of the existence of a nuisance on property belonging to you situate at High street, in the occupation of A. G. Sheard, A. Rollinson, and others, arising from untrapped drains, do hereby require you within three days from the service of this notice to abate the same, and for that purpose to execute such works as may be necessary to completely remove the nuisance, and to effectually prevent its recurrence."

The applicant, not having complied with this notice, was summoned to appear before the justices upon the information of the clerk to the board, and upon the hearing of the summons on the 2d of October, 1885, the justices made an order under the Public Health Act, 1875, by which order the applicant was ordered and required, as owner of the premises in question, "to abate the said nuisance within one month from the service of this order or a true copy thereof, and to execute such works and do such things as may be necessary for that purpose, so that the same shall no longer be a nuisance or injurious to health."

A rule nisi for a certiorari was obtained on behalf of the applicant to bring up the order on the grounds: (1) That the notice served by the local board was bad because it did not specify the works and things to be executed and done; and (2) that the order was bad on the same ground, and as being based on an invalid notice.

MATHEW, J. I am of opinion that this rule must be made absolute. The order made by the justices is objected to on the ground that it did not specify the works and things required to be done in order to abate the nuisance; and the question for the decision of the court is whether section 96 of the Public Health Act, 1875, requires those works and things to be specified in the order. It was argued on behalf of the local board that there need be no specific description in the order of what

of Works for Wandsworth District, 27 Law Journal (N. S.) Chancery, 342 (1857-58). See, also, U. S. Fidelity & Guaranty Co. v. Linehan, 73 N. H. 41, 58 Atl. 956, post, p. 80.

As to the difference between quasi judicial and quasi legislative orders, especially as regards the construction of statutes giving a right of appeal, see Nelson v. State Board of Health, 186 Mass. 330, 71 N. E. 693 (1904).

See, also, Morford v. Board of Health of Asbury Park, 61 N. J. Law, 386, 39 A. 706 (1898).



was necessary to be done to abate the nuisance; that the board in many instances could not ascertain what was best to be done for that purpose; that if the justices gave specific directions in their order the owner might be compelled to incur expense which would turn out to be fruitless, and it was sought to be implied that the act intended that the justices might require the owner, who, it was said, would probably best know what should be done to abate the nuisance upon his own premises, to do such things as were necessary to carry out that object. But the answer is that the difficulty cast upon the owner or occupier of the premises would be just as great. If, after he had incurred expense in doing what he thought was necessary, the nuisance was not abated, he might be required by the justices to incur further expense by executing further works, and I cannot think that such a state of things was intended by the legislature. The justices have abundant means of information with respect to the existence of the nuisance, and how it is brought about. The act provides a penalty for noncompliance with the order, and the terms of the statute must be strictly followed before the owner can be made liable. Looking at the terms of the statute I entertain no doubt that the legislature intended that the justices should decide what works and things should be executed or done. Section 92 enables the local authority to inspect premises within their district "with a view to ascertain what nuisances exist calling for abatement under the powers of this act, and to enforce the provisions of this act in order to abate the same." They are therefore put in a position to say what should be done to abate the nuisance. Section 94 provides that they shall serve a notice upon the person by whose act, default, or sufferance the nuisance arises or continues, or upon the owner or occupier of the premises, "requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose." Now who is to say what works and things are necessary? The justices before whom the question is brought and all the facts of the case appear. Looking at the intention of the legislature as shewn by the language of the act, I think the sensible interpretation is that the justices, and not the owner or the occupier, should decide what is necessary. But the matter is made still clearer by referring to the forms provided by the act; and section 317 provides that the schedules shall be read and have effect as part of the act, and that the forms contained in Schedule IV, "or forms to the like effect, varied as circumstances may require, shall be used and shall be sufficient for all purposes." Now Form A, in Schedule IV, is the form of notice applying to the abatement of nuisances, and in that the owner or occupier is required to abate the same, and the notice runs on thus: "and for that purpose to [state any things required to be done, or works to be executed]." Again, Form C, which is the form of the justices' order, is in these terms: "We do order the [owner or occupier] within [specify the time] from the service of this order or a true copy thereof according to the said act [here specify any things required to be done or works to be executed, as,

for instance, etc.].” I am therefore of opinion that the legislature has required that the things to be done shall be specified in the order.

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REG. v. HORROCKS.

High Court of Justice, Queen's Bench Division. [1900] 64 J. P. Rep. 661.

Rule nisi for a certiorari directed to the justices of Cumberland to show cause why a certain order made by them should not be brought up to be quashed on the ground that it did not specify the acts to be done by the appellant in order to abate the nuisance. \* \* \*

DARLING, J. This is a case where an order was made under sections 96 and 105 of the Public Health Act of 1875 in the following terms. The justices order the appellant within one calendar month from the service of the order “to take such steps as may be necessary to abate a nuisance so that the same shall be no longer a nuisance or injurious to health,” and further, that the said justices being of opinion that notwithstanding the cause or causes of nuisance may be removed the same is or are likely to recur do therefore prohibit the said Samuel Boustead from doing any such acts as may lead to a recurrence of the nuisance.

Now it is argued that the order is good because, as in this case the proceedings are taken by a private individual under section 105, it cannot specify in the same detail the works required to be done as if the proceedings had been taken by the local authority. Now section 105, which empowers a private individual to take proceedings, is as follows:

“Complaint may be made to the justices of the existence of a nuisance under this act on any premises within the district of any local authority by any person aggrieved thereby or by any inhabitant of such district, or by any owner of premises within such district, and thereupon the like proceedings shall be had with the like incidents and consequences as to the making of orders, penalties for disobedience of orders, appeals and otherwise as in the case of a complaint relating to a nuisance made to a justice by the local authority.”

I therefore think there is no distinction made in the act between proceedings instituted by private persons and proceedings instituted by local authorities and in each case I think the order must be drawn up with the same particularity. Now the order here does not specify the works to be done. It merely says “take such steps as may be necessary to abate the said nuisance.” That is not a mere matter of form. The appellant might be in a great difficulty as to know what steps to take, and the order as to that is bad and ought to be quashed. But now as to that part of the order containing the prohibition of doing such acts as may lead to a recurrence of the nuisance. There is no other way of prohibiting a person than by saying “you are prohibited.”

I do not know what else the order could have said except “do not accumulate slaughter-house refuse.” Section 96 says an order may be

made prohibiting the recurrence of the nuisance and directing the execution of any works necessary to prevent the recurrence, but in the present case no works are necessary to prevent the recurrence of the nuisance. If works are necessary either to abate or to prevent the recurrence of a nuisance they must be specified; but in the present case, no works being necessary to prevent the recurrence of the nuisance, it is not necessary to say more than the order has already said as to that.<sup>14</sup>

### SOUTHEASTERN RY. CO. v. RAILWAY COMMISSIONERS.

Court of Appeals, 1881. 6 Q. B. D. 586.

LORD SELBORNE, L. C. The order of the Queen's Bench Division which is appealed from in this case, by overruling generally the demurrer of the Railway Commissioners to the declaration in prohibition of the South Eastern Railway Company, has affirmed the incompetency in point of law of the commissioners to order the company (upon an application by the corporation of Hastings) to execute certain improvements of, or connected with, their stations at Hastings and St. Leonards.

If the commissioners have authority to order those improvements, or any of them, to be made, it must be derived from the third section of the Act 17 & 18 Vict. c. 31, which empowered the Court of Common Pleas (or any judge of that court) upon complaint made against any railway company of anything done or of any omission made in violation or contravention of that act, to hear and determine the matter of such complaint, and on being satisfied (after due inquiry) of its truth, to issue a writ of injunction restraining such company from further continuing such contravention or violation of this Act, and enjoining obedience to the same. Obedience to any such injunction was to be enforced by attachment and by other penalties. By a later act (36 & 37 Vict. c. 48) the power thus given was transferred to the Railway Commissioners.

The first observation which arises upon this enactment is that it does not enable the commissioners to impose upon a railway company any new duties or obligations depending upon any mere exercise of the commissioners' own judgment. Their authority is only to inquire into and to prevent violations or contraventions of the statute. For this purpose alone they may issue a writ of injunction, the form of which (according to the 5th rule made under the act by the Court of Common Pleas) was to be prohibitory if the statute were contravened by any positive act, and mandatory if it were contravened by any mere omission or nonfeasance. See 15 C. B. 472. In both cases alike the obligation to be enforced by the writ must have been already created by

<sup>14</sup> See *Ballentine v. Webb*, 84 Mich. 38, 49, 47 N. W. 485, 13 L. R. A. 321.



the statute. The question into which the court was to inquire was not one of expediency but of fact. Such an authority was in harmony with the general functions of a court of law, although its exercise might require special powers (such as those to conduct inquiries by engineers or others), and although it was given in a very peremptory form, all appeal (in the proper sense of that word) even from the decision of a single judge being excluded. A discretionary power, to dictate to a company what structural works it should or should not execute for the purposes of its undertaking, would have been evidently much more suitable to a practical and scientific than to a legal tribunal. \* \* \*

The enlargement in some reasonable way (whether by platform or by waiting-room accommodation) of a space insufficient for the proper reception of ordinary passenger traffic, and some proper provision for the delivery of cattle from the company's waggons, without those risks which seem now to attend their passage through the station yard, are things which approach more nearly to my conception of facilities which the commissioners, in the due exercise of their jurisdiction, might hold to be necessary and required by the act. I am by no means prepared to say that there is no form of mandatory injunction which they can properly issue for these purposes. It does not, however, follow that they can order a certain number of waiting-rooms to be provided, or dictate their classification, position, or dimensions, or enjoin the company to make cattle-pens upon a particular piece of ground now used for other purposes. It may well be that by the execution of such works as these, or some of them, the obligation imposed upon the company by the statute might be fulfilled, nor should I be disposed to impute any excess of their jurisdiction to the commissioners, if they were merely to indicate for the consideration of the company, these or any other convenient means by which in their opinion that obligation may be fulfilled. But between any such reasonable suggestions, and a peremptory order for the execution of these particular works, there is a wide difference. I can find no warrant in the statute for the assumption by the commissioners of a general control in matters of this kind over the discretion of the company as to the best means (when there is a choice of means) of fulfilling their statutory obligations. \* \* \*

*Insert.* BRETT, L. J. The power to make an order being instituted by a statute which describes the kind of order it enables the tribunal to issue, the jurisdiction of the commissioners is also confined to making such an order as is described in the statute and formulated in the rules. See 15 C. B. 473. The order, therefore, can only legally be made with regard to matters which the commissioners may properly entertain, that is to say, with regard to matters which by their omission or commission may affect facilities in receiving, forwarding, or delivering traffic. The order may direct the discontinuance of acts complained of, if they are done in violation or contravention of such facilities, or may order that

certain omissions complained of shall be supplied, if they are in violation or contravention of the same facilities. To form an opinion whether omissions complained of are an omission of reasonable facilities, it may be right, and even necessary, that the commissioners should receive and consider evidence of specified schemes or methods for supplying the alleged omission; but the order can only direct that the omission must be supplied either wholly or to a declared reasonable extent. If the omission can be supplied in more than one way, the commissioners have no jurisdiction to declare which way is to be preferred. The discretion as to such a matter rests with the company.

The commissioners, therefore, in this case, might properly receive evidence of specific methods of supplying the alleged omissions of reasonable facilities for the receiving, forwarding, and delivery of passengers or goods, and might properly consider whether the nature and expense of such specific methods of supplying facilities made the omission of such facilities reasonable or unreasonable; but the commissioners had no jurisdiction to order that the omissions, which they determined ought to be supplied, should be supplied by any specified works to be constructed in any specified form or in any specified locality.

\* \* \* So as to enlarging the bridge. The order to extend the platform accommodation is an order dealing with a matter within the jurisdiction of the commissioners, if there was some legal evidence of a want of reasonable accommodation in that respect for receiving or forwarding the average number of passengers. If there was evidence before the commissioners that the platform accommodation for getting into, or out of, or waiting for, trains was not reasonably sufficient for the passenger traffic, and that further accommodation in that respect could be reasonably given within the limits of what might reasonably be treated, as above defined, as the existing station, the commissioners might legally have declared that there was an omission of reasonable facilities in respect of platform accommodation, and might have enjoined the company to supply further platform accommodation to a specified extent as to twice the existing extent, or so as to accommodate so many more passengers; and the commissioners might properly have received evidence of specific schemes of improvement so as to determine what amount of further accommodation it would be reasonable to require; but the commissioners exceeded their jurisdiction, by ordering the platform to be extended according to the plan of the engineer, that is to say, in one way only. If they could make an order in such a form, their order would be disobeyed though an equal accommodation could be given in some other way. They have no power under any circumstances to make an order in any form to such effect. Therefore the order so framed is an excess of jurisdiction.

#### NOTE.

Henderson, G. C., "The Federal Trade Commission," pp. 72-74: "Another limitation on the Commission's authority, as it has been defined by the Supreme Court, is that the order can prohibit only the method of competition or

other practice charged in the complaint. If some other unlawful practice is revealed by the testimony, a new or amended complaint must, it seems, be filed and the statutory procedure followed as though a new proceeding were involved.

"The limitation suggests, however, a more difficult question. Must the order be limited to the precise misrepresentation, or unfair conduct, or improper practice, described in the complaint and established by the findings, or may it prohibit the general practice of which the specific conduct in question is an example? The question is one of great practical importance, and also one of considerable difficulty, as a few examples will show.

"Suppose that the complaint charges, and the findings establish, that respondent has sold, under the name 'silk,' a product composed of 40 per cent. silk and 60 per cent. cotton. What should the order prohibit? Under the statute, it must prohibit the method of competition charged in the complaint, but the question is what that method is. Is it the practice of misbranding, so that an order could be issued prohibiting misbranding in general, regardless of the product or of the nature of the misleading brand? Or is it, to go to the other extreme, the practice of selling as silk a product composed of 40 per cent. silk and 60 per cent. cotton? On the latter view, the Commission must restrict its order to the precise practice charged, and respondent could avoid the effect of the order by varying the percentage of cotton and silk. Such an order would of course be useless. Some of the Commission's misbranding cases appear to prohibit the application of the misleading brand only to the precise product found to have been used in the past. More often, however, the orders prohibit the sale under the name or brand in question, of any product not composed of the material indicated thereby. The use of the word 'silk,' for instance, is forbidden unless the material is made wholly of the cocoon of the silkworm, or the word 'manila' unless the rope in question is made exclusively of manila fibre. In the Winsted Hosiery Case, the only misbranding case which has reached the Supreme Court, the order, in the form in which it was sustained by the court, was somewhat more elaborate:

"It is now ordered, that the respondent, the Winsted Hosiery Company, its officers, agents, representatives, servants, and employees, do cease and desist from employing or using as labels or brands on underwear or other knit goods not composed wholly of wool, or on the wrappers, boxes, or other containers in which they are delivered to customers, the word "Merino," "Wool," or "Worsted," alone or in combination with any other word or words, unless accompanied by a word or words designating the substance, fiber, or material, other than wool, of which the garments are composed in part (e. g., "Merino, Wool, and Cotton;" "Wool and Cotton;" "Worsted, Wool and Cotton;" "Wool, Cotton and Silk"), or by a word or words otherwise clearly indicating that such underwear or other goods is not made wholly of wool (e. g., part wool)."

Henderson, G. C., "The Federal Trade Commission," pp. 76, 77: "The examples show that the Commission has constantly to steer a course between Scylla and Charybdis in drafting its orders. If the order is too general, it goes beyond the practice which respondent is found to have used. If it is too narrow, it can be evaded by a slight modification of the practice. An order to cease circulating an advertisement, the precise text of which is set forth, is too specific to be of any value, while an order to cease defrauding or misleading purchasers by writing 'any letter or other communication containing any false, misleading or deceptive statement or representation' is of doubtful validity. It is little more than an injunction to be honest."



### SECTION 3.—THE ADMINISTRATIVE IMPOSITION OF CONDITIONS IN THE GRANT OF LICENSES

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SOUTHERN PACIFIC CO. v. OLYMPIAN DREDGING CO.,  
260 U. S. 205, 208, 43 S. Ct. 26, 27, 67 L. Ed. 213 (1922): "The power to approve implies the power to disapprove and the power to disapprove necessarily includes the lesser power to condition an approval."

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#### REG. v. BOWMAN et al., Justices.

High Court of Justice, Queen's Bench Division. [1898] 1 Q. B. 663.

Rules to justices for the borough of South Shields for a certiorari to bring up an order granting a license to one John Duncan to sell intoxicating liquors to be quashed, and for a mandamus to hold an adjournment of the general annual licensing meeting and hear and determine according to law an application by the said Duncan for a license.

At the general annual licensing meeting for the borough of South Shields held on August 25, 1897, John Duncan, who was at that time the holder of three licenses to sell intoxicating liquors within the borough, applied for a provisional full license to sell intoxicating liquors on certain premises then about to be erected. The hearing of the application was adjourned to September 29, when Henry Yooll and John George Patton, being inhabitants and ratepayers of the said borough, attended the licensing sessions and opposed the application. At a further adjourned session held on November 3 the chairman of the licensing committee stated that the justices had decided to grant the license on condition of the three existing licenses being surrendered and of a sum of £1,000. being paid by Duncan to the justices. The conditions having been performed, the license was granted, and the grant was subsequently confirmed. Messrs. Yooll and Patton thereupon obtained the above-mentioned rules for a certiorari and a mandamus on the ground that the justices in annexing the said conditions to the grant of the license were acting illegally and outside their jurisdiction.

It was admitted by them that it was the intention of the justices to apply the £1,000. so paid by Duncan in reduction of the rates of the borough, or for some other similar public purpose.

WILLS, J. This is a case of considerable importance, but it is one which presents no difficulty as soon as the facts (which are not in dispute) are ascertained. It is clear that any member of the public has a right to be heard in opposition to an application for a license, and, having such a right, he is entitled to be heard according to legal

principles. If the justices allow themselves to take into consideration matters which have no bearing upon the merits of the case before them, and which influence their minds in arriving at their decision, it cannot be said that the objector has been heard according to law. In the present case the justices stated that they were prepared to grant the license upon the terms that the three existing licenses then held by the applicant should be surrendered, and that he should further pay to them a sum of £1,000. for some public purpose.

As to whether the justices were entitled to attach the condition of the surrender of the old licenses I will express no definite opinion, though as at present advised I incline to the view that they might lawfully have done so, as the number of the licensed houses which the needs of the neighborhood demanded was one of the matters which they had to consider. But the condition of the payment of £1,000. was wholly unjustifiable. If authority were needed, it is enough to refer to the case, which was cited, of *Rex v. Athay*, 2 Burr. 653. 'The justices had no more right to require the payment of money for public purposes than to require that it should be paid into their own pockets. If the attachment of such a condition were allowed to pass without objection, there would soon grow up a system of putting licenses up to auction—a system which would be eminently mischievous and would open the door to the gravest abuses. No doubt the justices were acting in perfect bona fides and in the interests of the public. But their conduct was none the less illegal. There has been no real hearing, and the mandamus must therefore go. \* \* \*

DARLING, J. I entirely agree. The justices have here done a thing which in a few years' time they may perhaps be allowed to do.<sup>15</sup> They have sought to make vendors of intoxicating liquor, and through them the persons who indulge in it, bear more than their ordinary share of the public burdens. It has often been suggested that a law to that effect would be a very proper one to enact. But it is not law yet. If ever it is made the law it must be by the authority of Parliament, and when Parliament does so enact it will no doubt take care to specify the particular public objects to which the money is to be applied. The justices have here approached the consideration of the case with preconceived theories as to the proper distribution of the unearned increment of value arising from the grant of a license to particular premises, and have allowed those theories to influence their decision. Under those circumstances it is enough to refer to *Reg. v. Adamson*, 1 Q. B. 201, to show that a mandamus must be allowed. \* \* \*<sup>16</sup>

<sup>15</sup> The power was given by Licensing Act 1904, § 4.

<sup>16</sup> Money paid, having been illegally exacted in consideration of the grant of a license, may be recovered back. *Brocklebank, Ltd., v. The King*, [1924] 1 K. B. 52.

See *Hamilton v. Dillin*, 21 Wall. 73, 22 L. Ed. 528 (1874).

## VAN NORTWICK v. BENNETT.

Supreme Court of New Jersey, 1898. 62 N. J. Law, 151, 40 Atl. 689.

On certiorari to review the granting of a license to sell ale, etc., by the Monmouth pleas.

VAN SYCKEL, J. The defendant, Bennett, applied for a license to sell ale, strong beer, etc., under the act approved April 4, 1872 (Gen. St. p. 1797, pl. 60).

This application, as recommended by the ten freeholders [as required by the said act, and in due form], was for a license to sell in the place occupied by the petitioner, being the northwesterly side of the building erected on the southeasterly side of Shark river, between the county bridge and the railroad bridge.

When the application was presented to the Monmouth pleas there was a remonstrance against granting it. Thereupon the application was amended by restrictive words, defining the portion of the premises in which the license was to be used, and the following clause was inserted in the affidavit thereto: "This application is made with the express understanding that no open bar is to be maintained, and that the purpose of this license is to serve guests at table with meals."

The affidavit was not again taken after this alteration, nor did the freeholders who recommended the application sign the recommendation after the petition was altered.

The court granted a license to Bennett "with the express condition that no open bar was to be maintained, and that the purpose of the license was to serve guests at table with meals."

The act of 1872 prescribes the form of the license which the court may grant, which is "to sell malt liquors in the place which the applicant keeps." A license so granted authorizes the licensee to keep an open bar. From the fact that the court annexed to the license granted a condition that he should not keep an open bar, and should sell only with meals served, we must infer that in the exercise of its discretion the court decided that a license such as the statute authorizes should not be granted. The license granted is not authorized by the act of 1872, or by any other statute, and was not recommended by ten freeholders. The common pleas, therefore, had no jurisdiction or authority to grant such a license. A constituent essential to the jurisdiction of the court was absent, and that makes its action subject to review in this court, under the case of Dufford v. Nolan, 46 N. J. Law, 87.

The suggestion that the restriction imposed will be in the interest of good order cannot be considered. Licenses can be granted only in virtue of the statute. The Legislature alone prescribes the conditions and terms, and the common pleas is without power to depart from these provisions, and to say that, although the license provided by law ought not to be granted, it will issue some other license not authorized



by the act. The action of the court has no basis in legislation, and is therefore invalid.

The license certified is vacated and set aside.<sup>17</sup>

#### SECTION 4.—GRANT ON CONDITION THAT LICENSE MAY BE REVOKED

##### SARLO v. PULASKI COUNTY.

Supreme Court of Arkansas, 1905. 76 Ark. 336, 88 S. W. 953.

HILL, C. J. When the matter of granting liquor license in Pulaski county for the year 1905 came before the county court, the court decided to grant license in the county upon this condition or reservation which was incorporated in the license issued to all applicants who were found qualified, to wit: "Conditioned that this license is issued by the consent and agreement of the licensee, upon the condition that if the licensee shall permit gambling upon the premises, or if gambling occurs upon the same through his connivance or agency, or if he is

<sup>17</sup> See, however, *In re Bloomingdale* (Sup. Ct.) 38 N. Y. S. 162 (1894); *People v. Owen* (Sup. Ct.) 116 N. Y. S. 502 (1909).

Compare *Chester v. Wabash, etc., Co.*, 182 Ill. 382, 55 N. E. 524 (1899), consent with a time limit held valid. As to the validity of consents given for a consideration, see *Maguire v. Smock*, 42 Ind. 1, 13 Am. Rep. 353 (1873); *Howard v. First Indep. Church*, 18 Md. 451 (1862); *Doane v. Chicago City R. Co.*, 160 Ill. 22, 45 N. E. 507, 35 L. R. A. 588 (1895); *Hamilton Traction Co. v. Parish*, 67 Ohio St. 181, 65 N. E. 1011, 60 L. R. A. 531 (1902).

See *Francis v. Francis*, 203 U. S. 233, 242, 27 Sup. Ct. 129, 132, 51 L. Ed. 165 (1906): "It follows that the words in the patent of 1827, 'but never to be conveyed by them or their heirs, without the consent and permission of the President of the United States,' were ineffectual as a restriction upon the power of alienation. The President had no authority, in virtue of his office, to impose any such restriction; certainly not without the authority of an act of Congress, and no such act was ever passed."

See *Sidney and Beatrice Webb*, *English Local Government*, I, "The Parish and the County," p. 541: "The whole sphere of licensing afforded a wide opportunity for virtual legislation. We have sufficiently described elsewhere the extent to which the justices, at first in pairs and afterward in Brewster sessions, exercised their plain legal right to impose conditions on alehouse keepers seeking licenses, and to bind them over, by 'articles' attached to the statutory recognizances, to close at certain hours or on certain days, to follow this or that line of conduct, and to abstain from particular lawful acts of which these particular justices chose to disapprove."

As to the power of municipal corporations to annex conditions to their consent to the laying of railroad tracks or to the placing of other public utility appurtenances in the public streets, see *Byrne v. Chicago General R. Co.*, 169 Ill. 75, 83-85, 48 N. E. 703 (1897); *Allegheny City v. Millville, etc., Ry. Co.*, 159 Pa. 411, 28 Atl. 202 (1893), in favor of the power; *Matter of King County Elevated R. Co.*, 105 N. Y. 97, 114, 13 N. E. 18 (1887) *quære*; *State ex rel. v. City of Sheboygan*, 111 Wis. 23, 86 N. W. 657 (1901), and *Wisconsin Telephone Co. v. Milwaukee*, 126 Wis. 1, 104 N. W. 1009, 1 L. R. A. (N. S.) 581, 110 Am. St. Rep. 886 (1905), against the power.

As to licenses legislatively conditioned on surrender of constitutional rights, see note, 21 Ill. Law Rev. p. 385.

guilty of a breach of the Sunday law, or the law against keeping disorderly houses, the county court may at any time revoke this license, this license being issued upon the express condition, and with that reservation." Sarlo agreed to the terms, accepted the license, and conducted a saloon thereunder. He violated the Sunday law against keeping open saloon, and was fined therefor. The prosecuting attorney filed information before the county court reciting these facts, and praying revocation of his license. He was cited to answer, and on a hearing the license was revoked, and he appealed to the circuit court, where the case was tried on an agreed statement of facts developing the facts as set forth herein. The circuit court revoked the license, and Sarlo brings the case here.

The authorities are practically uniform in holding that a liquor license is a mere privilege, revocable at the will of the state. It is not a contract between the state and the licensee, and no property rights inhere in it. Constitutional limitations against impairing obligations, retroactive laws, etc., cannot be invoked in support of rights under it. It is not a vested right for any definite period; in fact, is not a vested right at all, but is a mere permission temporarily to do what otherwise would be a violation of the criminal laws. *Metropolitan Board v. Barrie*, 34 N. Y. 667; *Sprayberry v. Atlanta*, 87 Ga. 120, 13 S. E. 197; *Schwuchow v. Chicago*, 68 Ill. 444; *Moore v. Indianapolis*, 120 Ind. 483, 22 N. E. 424; *Columbus v. Cutcomp* (Iowa) 17 N. W. 47; *Martin v. State*, 23 Neb. 371, 36 N. W. 554; *Black on Intoxicating Liquors*, §§ 127-129. The power of the state over liquor licenses is complete. It is part of the internal police of the state, in which the power of the state is sovereign. The state may repeal the statute authorizing the license; revoke, annul, or modify the license; create conditions, limitations, and regulations subsequent to its issue burdening its exercise; and may delegate these powers to agencies of the state, as municipal corporations, county courts, boards of excise commissioners, etc. 17 Am. & Eng. Enc. (2d Ed.) pp. 262, 263; *Metropolitan Board v. Barrie*, 34 N. Y. 667; *Schwuchow v. Chicago*, 68 Ill. 444; *Sprayberry v. Atlanta*, 87 Ga. 120, 13 S. E. 197; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Black on Intox. Liq.* § 127.

In this state the issuance of liquor licenses is committed to the county court subject to a veto upon such issuance when the vote at the last biennial election in the county, township, or ward is against it. Kirby's Dig. § 5120. The grant or refusal of license, where it is voted to be lawful to issue it, is exclusively and finally determined by the county court. The county court may license all qualified persons applying therefor or may license none. It cannot be controlled in determining a policy of license or no license. When a policy of license is adopted, then the court must treat all alike who possess the legal qualifications. It cannot license favored classes or persons, and refuse others pos-

sessing similar qualifications. Whittington, Ex parte, 34 Ark. 394; Ex parte Levy, 43 Ark. 42, 51 Am. Rep. 550; Ex parte Clark, 69 Ark. 435, 64 S. W. 223.

Possessing this power derived from the state, which clearly has the power to insert conditions in the license like the one under consideration, or authorize one of its agencies to do so, the question remains, does the power above outlined in the county court include the power to grant licenses subject to a condition that the laws regulating the liquor traffic shall be obeyed by the licensee under penalty of revocation? The Supreme Court of Louisiana recently said: "We do not criticise the proposition pressed upon our attention that, where the power is delegated to a municipal corporation to forbid the sale of intoxicating liquors, it may grant the privilege of selling on terms and conditions it chooses to impose, and that then it has the power claimed for it to impose the additional condition that a license shall be subject to recall on violation of any statute or ordinance relating to the liquor traffic; that the municipality could then, as it were, exercise a sort of resolatory condition." Shreveport v. Draiss, 111 La. 511, 35 So. 727.

The state of Illinois conferred on municipalities the power to license, regulate, restrain, and suppress the liquor traffic. The Supreme Court of that state said: "The Legislature, then, having conferred such power, it was for the common council to determine whether they would wholly suppress the sale of intoxicating liquors, or grant the privilege on such terms and conditions as they might choose. And the power was ample under this grant to impose as a condition that when a license is granted it should be liable to revocation on the violation of the ordinances regulating the traffic, or, having absolute control over the whole subject of granting licenses, they may impose any other condition calculated to protect the community, preserve order, and to suppress vice." Schwuchow v. Chicago, 68 Ill. 444.

In Georgia a similar case arose, and the court said: "Under the charter the mayor and general council have power to grant licenses for the sale of liquors, or to prohibit the sale altogether by refusal to issue licenses. If they have power to prohibit the sale altogether by refusal to issue license therefor, they certainly have the right to issue license under such restrictions, conditions, and limitations as may seem proper to them." Sprayberry v. Atlanta, 87 Ga. 120, 13 S. E. 197.

The power of issuing liquor licenses was vested in the Commissioners of the District of Columbia, and they made a rule denying license to keepers of provision stores. One of the applicants contested, and claimed that this was legislative power, with which the commissioners were not vested; that the commissioners must pass on the applicants individually, and not exclude a class who otherwise possessed the legal qualifications to obtain license. The court said: "If they are invested with such discretion, may they not, by rule made *in advance*, say that in a given instance they will not issue a license, if it is apparent that



there is some good reason for making such rule? If it is an arbitrary rule, made without cause or reason for it, and is simply oppressive, it would be beyond the power of the commissioners, and this court might so declare." *U. S. v. Commissioners*, 6 Mackey (17 D. C.) 409.

Another phase of the case is presented in the consent of Sarlo to the condition. A case similar in many respects arose in Iowa, and the court said: "In this case the plaintiff took his license from the city with the distinct provision written upon it that 'a violation of any of the ordinances of the city by the party holding this license shall work a forfeiture of the same.' It was somewhat in the nature of a reservation, evidently intended as a safeguard against allowing improper persons to hold license, and the plaintiff took it with a full understanding of the consequences attendant upon a violation of the ordinances of the city. Having entered into the stipulation, so to speak, with the city, he cannot be heard to complain that while engaged in prosecuting the very business permitted by the license he violated an ordinance of the city, and the very terms of the license itself, and that, therefore, his license was revoked." *Hurber v. Baugh*, 43 Iowa, 514.

In Pennsylvania the court authorized to issue licenses imposed a condition upon a saloon keeper that he was not to sell beer in kettles, on account of the too great demand in the neighborhood for that form of drinking. He agreed to the condition, which was entirely beyond any statutory requirements. He violated the terms of his agreement. The court held that it was within the discretion of the licensing power to impose these conditions, which were manifestly promotive of the peace and sobriety of that particular locality, and the failure to observe them worked a revocation of the license. *Gerstlauer's License*, 5 Pa. Dist. R. 97. In *Schwuchow v. Chicago*, 68 Ill. 444, and *Sprayberry v. Atlanta*, 87 Ga. 120, 13 S. E. 197, importance was attached to the fact that the licensees had accepted the terms imposed by the municipalities, and took their licenses, as did Sarlo, with it written in the face thereof.

The power of the county courts is not so broad and extensive as the power conferred on municipalities and excise boards in the cases reviewed, and it is not clothed with superintending power over the liquor traffic. Its power over it is derived solely from the power to refuse license at all, and to determine the character of the applicants applying therefor. In the cases reviewed the power to impose conditions requiring obedience to the laws and other conditions promotive of the public good is derived from the power to refuse license, in that way prohibiting the business. The county court does possess this power of refusing license, and should, in determining the question of whether license should be granted, take into consideration the character of the applicants, particularly their character as to observance of the laws regulating their business. In the exercise of these duties the county court of Pulaski county adopted a policy of no license to any one except on condition of an obedience to the laws regulating saloons and a

forfeiture of the license on a failure to obey these laws. [The court is of opinion that it was within the power of the county court to adopt a requirement of obedience to the laws as a condition of granting any licenses, and, when the licensees voluntarily assumed these conditions, instead of refusing the license or availing themselves of their legal remedies to contest this power and the manner of its exercise, they cannot complain of a revocation of the license produced by their violation of the law contrary to their agreement and the terms of the license.]

The judgment is affirmed.

BATTLE, J., concurs in the judgment; not the opinion.

McCULLOCH, J. (dissenting). I do not agree with the majority of the court that the county court had either the power to insert the condition in the license, or to revoke the license after breach of the condition. However wholesome the exercise of such power may seem to be, it is sufficient to say that the Legislature has not seen fit to confer that authority, and it is not within the province of the courts to read it into the statute. The power to regulate and control the liquor traffic is vested exclusively in the General Assembly, which may delegate it to any other body or tribunal. It has not yet done so. The county court has no legislative power, and is not invested with power to regulate the sale of liquor. Its powers are limited solely to that of determining, after the people have voted affirmatively on the license question, whether or not license shall be granted, and to issue the same to such persons of good moral character who apply therefor. To that extent it may exercise the veto power to prohibit the liquor traffic altogether; but when it has determined upon the policy, and found the applicant to be a person of good moral character, and issued to him a license to sell whisky for the year, its powers are completely exhausted, so far as that applicant is concerned. In passing upon the question of license to a given applicant, the court must first determine whether or not he is a person of good moral character. The court cannot make a determination of that question, and take the applicant upon probation, so to speak, by granting a license upon condition that he shall thereafter continue to be of good moral character, or that he shall not thereafter violate the law, under penalty of having his license revoked.

None of the cases cited in the opinion of the majority, with a single exception, sustain the view that the county court has power either to insert the condition or to revoke the license. All of them are cases where the power of revocation is sought to be exercised by municipal boards having legislative functions, and empowered to regulate the liquor traffic. It is conceded, as before stated, that the Legislature has power either to impose conditions upon liquor licenses or to revoke them, or to authorize some other body to regulate the traffic by the imposition of conditions, and to exercise the power of revocation. The Legislature of this state has done neither. I am not aware of the decision of any court holding that a court or other body not exercising legis-

lative functions can revoke a license once issued, with the single exception of a decision of a district court of Pennsylvania cited in the majority opinion. In the case of *Lantz v. Hightstown*, 46 N. J. Law, 102, the learned judge delivering the opinion of the court said: "In regard to the exercise of the power over the subject of licensing inns the statute contains express mention of the grounds upon which the court of common pleas shall proceed to revoke the license before the expiration of the time for which it is granted. Revision, p. 489, § 24. This section contains a wide scope for judicial action, and the prescription of causes which shall be the ground for revocation is an implied admission of the absence of the power to revoke without legislative sanction. I know of no case where this power has been asserted in a case not coming within those mentioned in the act. (I can find no instance in the practice of boards of excise or other licensing bodies in which the power of revocation has been exerted except under the provisions of a statute.)" Our statute (Kirby's Dig. §§ 2052-2057) prescribes the offenses for which the license of a saloon keeper may be canceled, and it may be said that this excludes the power to revoke for any other cause. It is not contended that the county court has, under this statute, the power to adjudicate the guilt of the licensee of the offenses named, and to revoke his license on that ground. That power is lodged in the courts exercising criminal jurisdiction, and the cancellation of the license follows as a part of the penalty for the violation of the law.)

(The right of the county court to revoke the license is based in the majority opinion upon the ground that the appellant accepted the license, and voluntarily assumed the performance of the conditions imposed, and cannot, therefore, now be heard to dispute the power of the court to impose the conditions to revoke the license for his failure to perform them; an application, as I understand it, of the doctrine of estoppel. I think it is a misapplication of that doctrine, as the license is in no sense a contract, and appellant was not, by acceptance of the license, barred from disputing the power of the court to insert conditions not authorized by law.) In the case of *Drew County v. Burnett*, 43 Ark. 364, the county court had exacted of an applicant for liquor license a tax of \$50 in excess of the amount fixed by the statute. He paid it under protest, and sued the county to recover the excess, and this court held that the requirement of payment of the excess was an illegal exaction, and that the applicant could recover it from the county. Now, if the majority of the court are correct in their view that the power of the county court to prohibit the liquor traffic altogether involves the power to permit it upon conditions, then it could be said with equal force that the court has the power to issue license only on condition that the applicant pay an assessment in excess of the tax fixed by statute. This court has held (properly, I think) in the case cited above that the county court cannot exact excessive amount for the



license, and I think it reasonably follows from this that the county court has no power to impose any condition at all, and that, if such are imposed, the court lacks power to enforce them.<sup>18</sup>

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## SECTION 5.—CANCELLATION OF LICENSES

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### BROUGHAM v. BLANTON MFG. CO.

Supreme Court of United States, 1919. 249 U. S. 495, 39 S. Ct. 363, 63 L. Ed. 725.

Mr. Justice McKENNA delivered the opinion of the Court.

Appellants are officers of the Department of Agriculture charged with the administration of the meat inspection acts. The appellee, Blanton Manufacturing Company, is a manufacturer of oleomargarine and brought this suit against appellants to enjoin and restrain them from interfering with it in the use of the word "Creamo" as a trade-mark in the manufacture and sale of its product and the use of that mark upon packages of its product shipped from St. Louis in interstate commerce.

The District Court granted the injunction and its decree was affirmed by the Circuit Court of Appeals. 243 F. 503, 156 C. C. A. 201.

As a ground of suit and recovery the company relies upon the following facts and they express, in a general way, its contentions. To what extent they should be modified will be apparent as we proceed.

The company is a manufacturer of oleomargarine, having a factory at St. Louis, Mo., which comprises a group of buildings specially arranged and equipped for the purpose of such manufacture and where the company has made an investment of many thousands of dollars. Its product has been sold in packages of various sizes, marked with a trade label or stencil adopted for that purpose, which trade-mark is the word "Creamo," used since 1904. Its trade has become extensive and valuable, its product has acquired a high reputation and become a source of profit, increasing yearly, and an interruption in the use of its trade-mark and label would cause serious injury in a sum exceeding \$5,000.

January 6, 1908, the company applied to the United States Patent Office for the registration of "Creamo" as a trade-mark, it was duly registered June 9, 1908, and the company has since enjoyed the use of it and made contracts with dealers under it, and the company's oleomar-

<sup>18</sup> See *Malkan v. Chicago*, 217 Ill. 471, 75 N. E. 548, 2 L. R. A. (N. S.) 488, 3 Ann. Cas. 1104 (1905); *City of Lowell v. Archambault*, 189 Mass. 70, 75 N. E. 65, 1 L. R. A. (N. S.) 458 (1905); *Metropolitan Milk & Cream Co. v. City of New York*, 113 App. Div. 377, 98 N. Y. S. 894 (1906).

"On behalf of the respondent it was not disputed by Mr. Montgomery that, if the condition was ultra vires, the appellants are entitled, although the license was given and accepted with that condition, to take advantage of the contention that it is ultra vires." *Theatre de Luxe v. Gledhill*, [1915] 2 K. B. 54.

garine is known to its customers far and wide by that label, trade name and mark.

In 1906, after the enactment of the act of June 30, 1906 (34 Stat. 669, c. 3913 [Comp. St. § 8682]), concerning the inspection of "meat and meat food products," the company was informed by the Bureau of Animal Industry that its [the company's] plant would be subject to inspection under the act of Congress. The company objected but yielded to avoid controversy and hazard to its interest, and an inspector was installed. The company, however, contends that its manufacture of oleomargarine is not subject to the power and authority of the bureau.

The Secretary of Agriculture, in 1907, approved the company's trade-mark of "Creamo," and upon the faith of the approval the company has used the same and by expenditure of large sums of money has extended its popularity and publicity; but, notwithstanding, Dr. Brougham [one of the appellants] threatened the company that from and after March 1, 1914, its use would not be allowed and that the inspector in the establishment of the company would enforce the threat and attempt to prevent the use of the trade-mark and label.

The trade-mark is duly registered in the office of the Secretary of State of the State of Missouri.

Some of the contentions of the company are somewhat difficult to handle—indeed, to get at in separation. One of these is that the Bureau of Animal Industry has no authority or power over the company's product, its manufacture or market. The basis of the contention is that the food products indicated by "the meat inspection act do not include a food product bearing the trade-name 'oleomargarine,' prescribed by a special revenue law to be used in the sale thereof, and that statutory name is not 'false or deceptive' when so used." And for the contention the company relies on *Homer v. Collector*, 1 Wall. 486, 17 L. Ed. 688, and *Chew Hing Lung v. Wise*, 176 U. S. 156, 20 S. Ct. 320, 44 L. Ed. 412. The further contention is that section 6 of the Oleomargarine Act (Act Aug. 2, 1886, c. 840, 24 Stat. 210 [Comp. St. § 6218]) requires the article to be packed in a particular way which is not the same as that prescribed by the meat inspection act and was in force before the latter was enacted, and therefore excluded "an article like this oleomargarine having a 'trade-name by law.' " And yet again that the Food and Drugs Act (Act June 30, 1906, c. 3915, 34 Stat. 768 [Comp. St. §§ 8717-8728]), which is "in pari materia, enacts that articles of food containing no poisonous or deleterious ingredients shall not be deemed misbranded" which shall thereafter be known as articles of food under their own distinctive names and not offered for sale under the distinctive name of another article if the name be accompanied on the same label or brand by the name of the place where manufactured or produced. And it is said that the company's oleomargarine bears that statutory trade-name and hence should not be considered misbranded. *United States v. Coca Cola Co.*, 241 U. S. 265, 36 S. Ct. 573, 60 L. Ed. 995, Ann. Cas. 1917C, 487, is adduced to

support the contention. We do not consider it necessary to follow the company's argument in detail. It is rather involved. We disagree with it. In other words, we are of opinion that the meat inspection act is applicable. This was the decision of the Circuit Court of Appeals. The company's oleomargarine is a meat product, compounded, among other things, of oleo oil and neutral lard.<sup>19</sup> Besides, it is not sold under the name of oleomargarine alone; there is the qualifying addition of the word "Creamo," and used, as we shall hereafter see, to qualify and distinguish it from other combinations which might bear the designation oleomargarine.

We pass to the consideration of the meat inspection acts of June 30, 1906, and March 4, 1907 (34 Stat. 669, c. 3913 [Comp. St. § 8682]; 34 Stat. 1260 [Comp. St. § 8681]). They require an inspection of all meat and meat food products prepared for interstate and foreign commerce and provide that no persons or firm or corporation shall offer for transportation, and no carrier shall transport in interstate or foreign commerce, any such products unless marked "Inspected and Passed," and that "no such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name, but established trade-name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted."

It is the contention of the government that the use of the word "Creamo" is deceptive and induces the belief that cream is a substantial ingredient of the oleomargarine. The company earnestly contends to the contrary and that, besides, the designation "Creamo" has received the approval of the Department of Agriculture and has been sanctioned as an appropriate trade-mark by the Interior Department (Patent Office). The latter contention may be immediately put to one side. The test of the product is the meat inspection laws, not the trade-mark laws, and therefore we are concerned with the action of the Department of Agriculture and not with that of the Interior Department. And so intimately is the case concerned with the action of the Department of Agriculture that the basic and dominant contention of the government is that to the department is committed the power of determining the fact of the influence of the name and label of the company. In other words, the power of determining whether a trade-name is "false or deceptive" given by the law to the Secretary of Agriculture is, when exercised, conclusive of the falsity or deception of the name (Bates & Guild Co. v. Payne, 194 U. S. 106, 24 S. Ct. 595, 48 L. Ed. 894, and cases cited; Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1036), and the power necessarily is a continuing one. The contention and the cited cases have been approved very lately

<sup>19</sup> Defined in the testimony to be "a lard produced from the leaf of a pig, neutralized so as to take the taste and smell out of it."—[Note by judge.]



in *Houston v. St. Louis Independent Packing Co.*, 249 U. S. 479, 39 S. Ct. 332, 63 L. Ed. 717, in which it is declared that the decision of the department, unless arbitrary, is conclusive. A sketch of the evidence, therefore, becomes necessary.

As early as 1904 there was, if not controversy, discussion between the company and the department. It was not of serious extent. The company was indulged in the representation that its product was composed of "Butter, Oleo Oil, Neutral, Cream and Salt," and that these were "churned in an abundance of richest cream, resulting in a perfect substitute for butter." But there was objection to a statement that the oils were "doubly inspected" by the United States inspectors, "insuring absolute purity and cleanliness." Such was the condition of things, we may deduce from the testimony, until 1908.

We may say, in passing, that in the beginning 30 per cent. of cream was used and the word "Creamo" was selected to suggest such ingredient to repel the criticisms of the butter makers who represented that oleomargarine was produced from "sewerage and dead horses." But it appears from the testimony that the use of cream was discontinued, skimmed milk being used instead, it having been discovered by the government chemists that it was not the butter fat in the milk which produced the flavor, but it, the flavor, came from skimmed milk.

October 2, 1912, an objection came from the department to the use of the company's label and discussion ensued, extending over a period of 12 or 15 months. The department then announced that the use of the word "Creamo" was "considered deceptive and misleading and its future use could not be permitted." It was, however, suggested that "Creamo Brand Oleomargarine" be used, the words to be displayed alike in prominent type, and that cream should be used in the product, its use having been discontinued. Upon this ruling of the department and the resistance of the company to it the contest was waged for a time. The company contended that the word "Creamo" was arbitrary and not descriptive; the department asserted the contrary and that it "conveyed a false inference to the consuming public," and, notwithstanding an offer by the company to use 10 per cent. of cream, insisted upon the use of the word "brand" and required also some modifications of the label. It further declared that if the requirements of the bureau should not be complied with on and after March 1, 1914, the inspector in charge at St. Louis would be instructed to prohibit "the use of all labels, wrappers, cartons, etc., which do not bear the bureau stamp of approval and number."

Such is the testimony in outline, and it is manifest that the action of the department was not arbitrary, but given upon a consideration of the circumstances and the fact of the trade-name "Creamo" having a deceptive implication to the consuming public.

But against the decision of the department the company opposes the previous approval of "Creamo" as a trade-name and alleges that upon the faith of the approval the company has used the same and by the expendi-

ture of large sums of money—testified to be about \$10,000 a year—has made its product public and popular under that name. The answer to the contention is that the meat inspection acts contemplate and confer a continuing inspection and power, a power necessarily not exhausted by one exercise. Besides, the approval was given at a time when the company used 30 per cent. of cream in its product and declared that it and other ingredients were “churned in an abundance of richest cream, resulting in a perfect substitute for butter.” The indulgence of the department had justification. When the practice of the company changed, when it commenced to vary the percentages of cream and finally used none at all, naturally the department changed its ruling. The company can, therefore, claim no right from the prior ruling. There may be value in the use of the trade-name “Creamo,” as the company asserts, and detriment, it may be, in any change or qualification of it; but its value may be in its deception—its suggestion of cream appealing to the popular preference for that article over skimmed milk, though the scientific judgment may be in favor of the latter, a judgment possibly not known or if known not appreciated or accepted. And the deception would not be taken away and the purpose of the law satisfied by the addition of 10 per cent. of cream which the company offered to make. At least such was the judgment of the department, and we cannot pronounce it arbitrary.

It will be observed from the quoted provisions of the meat inspection act that two conditions are presented: If “Creamo Oleomargarine” is to be regarded as the name of the product, it is false and deceptive, whatever it may have been formerly; if it be asserted to be an established trade-name, it has not received the approval of the Secretary of Agriculture, and hence its use is without legal permission.

Decree of the Circuit Court of Appeals is reversed, and the case remanded to the District Court, with direction to dismiss the bill.

Mr. Justice McREYNOLDS took no part in the decision of the case.

#### ✓ VOLP v. SAYLOR et al., State Board of Medical Examiners.

Supreme Court of Oregon, 1903. 42 Or. 546, 71 P. 980.

Mandamus by Heinrich Volp against W. H. Saylor and others, composing the board of medical examiners of the state of Oregon, to compel defendants to revoke an order canceling plaintiff's license to practice medicine. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

On June 13, 1891, plaintiff applied to the state board of medical examiners for an examination as to his qualifications to receive a license to practice medicine and surgery within the state. His examination proving unsatisfactory, the board issued to him what was intended to be a temporary license only, or a permit to practice for six months, in the following form: “This certifies that Heinrich Volp, having passed a satisfac-

tory examination in medicine and surgery before the Board of Medical Examiners, is hereby authorized under the provisions of the 'Act to regulate the practice of medicine in the state of Oregon,' passed by the Legislature in February, 1889 [Sess. Laws 1889, p. 144], to pursue the practice of medicine and surgery in this state under the conditions of the aforesaid act, till Dec. 13th, 1891." On the 30th of March, 1895, Volp presented this certificate, with the words and figures "till Dec. 13th, 1891," erased, to the secretary of the board, with an application to have it recorded, and his name entered upon the register of licensed physicians and surgeons, whereupon the secretary, not observing the erasure, and believing the certificate to have regularly authorized the applicant to practice without restriction, recorded it, and entered Volp's name upon the register. On July 2, 1895, Volp filed said defaced and altered certificate with the clerk of the county court of Multnomah county, and on July 7, 1897, had a certified copy of the same filed with the clerk of Harney county, meanwhile pursuing the practice of medicine, and pretending to be a regularly licensed physician and surgeon. On or about May 23, 1900, one W. L. Marsden made complaint to the board, charging Volp with having fraudulently caused the said certificate so changed to be recorded, and his name entered in the register, whereupon the board, after giving him notice through the mail, investigated the charge, and on January 4, 1901, made an order revoking the pretended license. Feeling himself aggrieved by this action, Volp instituted this proceeding by mandamus to require the board to revoke such order and reinstate him as a duly licensed physician and surgeon. Being unsuccessful in the circuit court, he has appealed to this court.

WOLVERTON, J. (after stating the facts). Plaintiff's counsel bases this appeal upon two contentions, the first being that the certificate issued by the board of medical examiners in effect licensed plaintiff to practice medicine and surgery without restriction; that, the board being without authority to issue a permit or a temporary license, and having certified that the licentiate had passed a satisfactory examination, and exercised its authority to license, it must be held to have exercised its powers legally, and to have granted a full license; and, the second, that the board was without jurisdiction to make the order revoking such license, because the licentiate was not regularly served with proper and legal notice of the pending proceedings.

The board of examiners issuing the certificate in question was organized and acting in pursuance of an act of the Legislative Assembly of 1889 entitled "An act to regulate the practice of medicine and surgery in the state of Oregon." Sess. Laws 1889, p. 144. It was stipulated at the trial in the circuit court that this board had no power to issue a temporary permit or license. It appears from the testimony of the secretary, however, that it had adopted the practice of giving temporary permits, so that the applicant, if unsuccessful, could still earn a livelihood, with the understanding that he again submit himself for an examination at the ex-



piration of the period fixed in the certificate. In compliance with this rule, the plaintiff did again submit to an examination, and, having again failed to come up to the requisite standard, received another certificate of like nature, granting him another extension of time in which to fit himself for a successful test of his qualifications. The act of 1889 was superseded by another, enacted at the 1895 session of the Legislative Assembly. Sess. Laws 1895, p. 61. By the last clause of section 3 of this latter act it is provided that all persons who have been regularly licensed under theretofore existing laws of the state, and have complied with the provisions thereof, shall be taken and considered as licensed physicians under this act, the secretary of the board being required to enter the names of such persons upon the register kept by him as licensed physicians and surgeons, upon the written application of such persons, accompanied with such license theretofore regularly issued. By section 7 it is further enacted that the person receiving the license shall present the same, or a copy thereof, to the county clerk in and for the county where he resides, who shall file it, and enter a memorandum thereof, giving the date of such license, the name of the person to whom issued, and the date of such filing, in a book kept for that purpose; and in case the person so licensed shall move into another county, he is required to procure from the clerk a certified copy of such license, and file the same with the county clerk in the county to which he shall remove. With a view of availing himself of the provisions of this later act, the plaintiff presented the certificate in question, with the words "till Dec. 13th, 1891," erased (giving it the color and appearance of a certificate regularly issued), to the secretary of the board. Having secured its record, and the entry of his name upon the register kept by such secretary as a licensed physician and surgeon, he caused such license to be filed with the clerk of the county court of Multnomah county, where he then resided, and, having subsequently removed to Harney county, procured a certified copy thereof, and filed the same with the county clerk of that county. By this means the plaintiff procured a record to be made up which upon its face shows him to have been regularly licensed and authorized to practice medicine and surgery in Multnomah and Harney counties. The plaintiff frankly stated at the trial that he made the erasure because he believed the board had no authority to put the words and figures erased into the certificate, and that he had a perfect right to remove them, thus admitting, in effect, that he practiced a deception upon the secretary of the board of examiners in getting him to put on record a false certificate, or one that the board under the previous law refused to issue to him because his examination disclosed that he was not entitled to it.

This brings us squarely to the legal issue presented by plaintiff's first contention. The counsel's reasoning is this: "The answer admits that the license delivered to plaintiff was an ordinary license, except that it was limited to six months, and that for that period it was valid. On the trial it was stipulated that the board had no power to limit the license. There-

fore, under the pleadings, the license is valid." The vice of this crude syllogism is that the conclusion does not follow from the premises. Because the board of examiners adopted an irregular and unauthorized practice, and issued a permit or license, using the form of a regular certificate, but limiting its duration, it does not follow that such board issued and delivered to plaintiff an ordinary or regular license, unlimited in its scope, and therefore valid. The simple solution is that the board exceeded its authority in issuing the form of license adopted. It had no intention of issuing a regular license. The applicant had not come up to the prescribed standard under his examination, and, acting upon a generous impulse toward him, so that he might yet have an opportunity of qualifying himself, and in the meanwhile engage in his adopted profession, the board gave him the permit to practice for six months. Now, to construe such an act into absolute regularity, and the permit of six months' duration into a license regular in form and unrestricted as to the time of its operation, would be to contort an irregular and void proceeding into one of due regularity and perfect legal efficacy. The board never issued such a license to the plaintiff as he now professes to have obtained, and his erasure of that portion of the certificate intended as a limitation cannot, by any rule of ethics or practice, either in law or morals, operate to admit him as a regular practitioner of medicine and surgery; so that he has never been by any act of the board licensed generally to practice his profession, but by his own willful act he has procured the making up of a record which is false, and without the power of either the board or its clerk to make—one that upon its face shows him to be a regularly licensed physician and surgeon. The fact that it is certified that Volp passed a satisfactory examination cannot aid him, as the certificate by its very terms limited the time the board intended he should exercise the privilege accorded, and the suggestion that the board is precluded from showing that the examination was unsatisfactory is without relevancy in the argument. It was wholly unnecessary that this should be done, as the board did not see fit to grant the full license, notwithstanding it certified that the examination was satisfactory. Plaintiff may have been entitled to a full license upon such a showing, but he did not get it, and his act of changing the certificate received could not operate as an act of the board granting that which he applied for.

In this connection it is further insisted that plaintiff's license could not be revoked except for unprofessional or dishonorable conduct, and that the act of plaintiff in changing the certificate, and thus procuring his name to be entered in the register, does not come within the meaning of such terms as declared by the act of 1895. This proceeds upon the assumption that the plaintiff was regularly licensed, and that he was then entitled to practice by reason thereof. But plaintiff had no such license to revoke. The record he caused to be made up gave him none, but it falsely showed that one had been regularly issued to him, and it was to

get rid of this record that the board took action. What the board really did was to vacate a void record.

This brings us to counsel's second contention—that plaintiff could not be deprived of his license without notice, and an opportunity to be heard, and that he was not regularly or legally notified of the pending proceeding to deprive him of his certificate. Now, a void decree, judgment, or order of a court of record entered without jurisdiction of the person or authority of law, when it so appears upon its face, may be vacated at any time by virtue of the power inherent in the court, and even upon its own motion. *Ladd v. Mason*, 10 Or. 308; *White v. Ladd*, 41 Or. 324, 68 P. 739. The rule could hardly be less authoritative in case of a board whose functions are quasi judicial; so that, where the record is admittedly fraudulent, as it is here, a court of justice will not intercede to reinstate it, even though it was vacated without notice to the party affected by the order. If the court could see that plaintiff had been deprived of any substantial right without an opportunity to be heard, the case would be different; but he is insisting upon a privilege vouchsafed to him by a license or record which he concedes to have been obtained through his own willful and fraudulent act, and the court will not thus intercede to permit him to enjoy the fruits of his own wrong. So that neither of the contentions of counsel is adequate to overturn the judgment of the trial court, and it will therefore be affirmed.

#### STATE ex rel. SCHAEFER v. SCHROFF.

Supreme Court of Wisconsin, 1904. 123 Wis. 98, 100 N. W. 1030.

Appeal from circuit court, Racine county.

Certiorari by the State, on the relation of Leonard G. Schaefer, against Henry J. Schroff, to review the action of the city council of Racine repealing a certain ordinance granting a liquor license. From a judgment in favor of the latter, defendant appeals. Reversed.

The relator obtained an ostensible license in July, 1903, to sell liquor in a part of the city of Racine, where an existing ordinance required the consent of certain neighbors as a condition precedent. In October it was represented to the council that such consents had been obtained by fraud and misrepresentation, and reversal of their action in granting the license was prayed; whereupon the council caused notice to be given to the relator to appear and show cause why his license should not be declared void for the specified reasons. Thereafter, in December, after some hearing and investigation, the council adopted a resolution that said ordinance "be and is hereby declared void and of no effect, and that the city clerk be and hereby is ordered to notify said Leonard Schaefer of the adoption of this resolution, and, further, that the money tendered by said Leonard Schaefer will be returned to him." The relator sued out writ of certiorari



to review the validity of this resolution, to which return was made by the respondent as city clerk, showing substantially the situation above stated. The circuit court held, as matter of law, that the council had no jurisdiction or power to declare said license void, except upon the grounds and by the procedure specified by section 1558, Rev. St. Wis. 1898, for a revocation, and entered judgment, reversing, annulling, vacating, and setting aside the resolution of the council.

DODGE, J. (after stating the facts). We deem it entirely plain, upon inspection either of the return or petition, that the council was in no wise attempting to exercise the jurisdiction conferred upon it by section 1558, Rev. St. Wis. 1898, to revoke a license, valid at its inception, but which, by reason of subsequent misconduct, the common council is authorized to recall. The petition of neighbors, the notice to Mr. Schaefer, the facts investigated, and the final resolution mark an inquiry and attempt to decide upon the question whether the license was valid originally, or void by reason of fraud perpetrated upon the council in obtaining it. Hence we need not consider whether the council acquired jurisdiction to act in revocation of this license under section 1558, or, by improper proceeding, lost such jurisdiction. The act done was to declare that the license was, and always had been, void. And it may be conceded to the relator that there is much in the record indicating the idea, both on the part of the petitioners and on the part of the council, that such resolution might have conclusive effect as an adjudication of the invalidity of the ordinance. As relator urges, however, there is nowhere in the statute or charter any authority given to the city council to make any such decision. Of course, there is an inherent power in the city to investigate, and to reach conclusion as to the attitude which it will take—whether to contend for the invalidity of such a license or not to make such contention; just as there is the right in any individual to investigate facts, and make up his own mind as to his attitude with reference to the legal validity of an act done by him. But, in absence of some authority of law, the city council could go no further. The license was neither more nor less valid by reason of the resolution here assailed. Such resolution concluded no one, and might not only be attacked collaterally, but wholly disregarded by any forum in which the validity of the license might be presented for consideration and decision.

To this view both parties accede, and of its correctness we can have no doubt. As a result, however, it is obvious that it does no injury to the relator. It took away no right which he previously had. Its utmost effect was to notify him that the council purposed to contend that his ostensible license was invalid. But, if that question was ever presented in a judicial forum for investigation or decision, his right to have the same tried as an independent and original one was not in any respect affected by the decision. (Certiorari

is a discretionary writ, which should issue only when necessary to prevent injustice or unlawful injury. Courts will not concern themselves, by this extraordinary writ, to declare the invalidity of non-judicial acts when the relator suffers no injury thereby. *Knapp v. Heller*, 32 Wis. 467; *State ex rel. v. Mayor, etc.*, 101 Wis. 208, 77 N. W. 167. In both of these cases the issue of the writ by circuit court was reviewed, and reversed on the ground that the cases presented failed to show equity in the relator; hence, that the issue of the writ was an abuse of the discretion of the lower court. In *State ex rel. Anderson v. Timme*, 70 Wis. 627, 36 N. W. 325, on an application to the original jurisdiction of the Supreme Court for a writ of certiorari, it was decided that the writ should not be issued, because the action of the land commissioners in investigating and declaring void a land patent was so entirely beyond their jurisdiction as to be wholly innocuous.

Complete analogy exists between the action of the land commissioners there considered and the action of the council now before us; at least from the standpoint of the relator. The action in each case was wholly without jurisdiction, could be of no possible force save as the mere gratuitous declaration of the opinion of the body from which it emanated, or at most a notification of that opinion and of their intended attitude; in one case toward the patent, in the other toward the license. We deem the reasoning of that case conclusive here—that it would be so needless an exercise of a court's power to review and pass upon the validity of that declaration that no court, in the proper exercise of its discretion, should issue its extraordinary writ of certiorari. Upon the same reasons it became the duty of the court, having issued the writ, upon being perhaps further enlightened as to the situation by the return, to have dismissed the proceedings.

Judgment reversed, and cause remanded, with directions to quash the writ and dismiss the proceedings.

#### BROWN et al. v. GRENIER.

Supreme Court of New Hampshire, 1905. 73 N. H. 426, 62 A. 590.

Bill in equity by Frederick H. Brown and another against Wilfred Grenier to cancel a certificate or license issued to defendant entitling him to practice dentistry. A decree was entered for plaintiffs, and defendant excepted. Transferred from the superior court upon an agreed statement of facts. Case discharged.

During the year 1902 Frederick H. Brown, George A. Bowers, and William R. Blackstone, residing and having offices, respectively, at Lebanon, Nashua, and Manchester, were the duly constituted members of the state board of registration in dentistry; Blackstone being clerk of the board. In the latter part of February, 1902, Grenier wrote

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Blackstone from Brockton, Mass., where he was employed in dentistry, inquiring whether the board would permit him to take examinations in French, and, if so, when. Blackstone replied that the board would allow him to take such an examination at any time, upon one week's notice to allow the board an opportunity to prepare questions. Four or five weeks afterward Grenier notified Blackstone that he would come to Manchester to be examined one week later, and at the time appointed came to Blackstone's office for that purpose. He paid a fee of \$10, and at this time inquired of Blackstone where the other examiners were. Blackstone said that he superintended all examinations; that examination papers were sent to the other members to be reviewed and were afterward returned to him with their findings; and that Grenier would be advised later as to the result, and a certificate would be issued to him if he passed a successful examination. Grenier then used the English language with difficulty and was unable to take the examination in that tongue, but was duly examined by Blackstone through an interpreter. The examination consumed several days. In addition to the written examination as to his knowledge of the theory of dentistry, Grenier gave a demonstration of his ability to do practical and operative work, according to the requirement of the board. About four weeks after the examination he wrote Blackstone from Brockton, inquiring as to the result, and was informed by mail that he had passed a satisfactory examination. No certificate was sent to him. A few days later he came to Manchester to get his certificate, or to learn why one had not been sent to him. Blackstone then told him that the answers in the examination papers being in French, there was an additional expense of \$50 for the review of the same by the examiners. Grenier thereupon paid \$50 to Blackstone and received the certificate in question, signed by all the members of the board. According to the practice and understanding of the board, the written examination papers were submitted to and passed upon by each member, and applicants were required to present themselves at the office of each member. Brown and Bowers, for the convenience of Blackstone, had signed diplomas or certificates in blank, for issuance to such applicants as passed the examinations. Grenier's examination papers were never submitted to Brown and Bowers for approval, nor did he ever present himself at the office of either of them for examination. The examination was taken by Grenier in good faith. He is a graduate of Laval University of Montreal, at which institution he took the course in dentistry, and he also served three years as an apprentice to a well-known dentist in Montreal. Upon receipt of his diploma or certificate, he at once fitted up dental parlors in Manchester, where he has since engaged in the practice of his profession.

BINGHAM, J. In 1891 the Legislature created the commission known as the "State Board of Registration in Dentistry." Laws 1891, p. 341, c. 43; Pub. St. 1901, c. 134. Three dentists constitute the board



(chapter 134, § 1), and two members of the board constitute a quorum for the performance of its duties (section 2). It is required to hold at least one session a year for the purpose of giving examinations to persons desiring to enter the profession (section 2). Any person can apply at a regular session and be examined "with reference to his knowledge and skill in dentistry and dental surgery" (section 3). Certificates or licenses are to be issued to such persons as, upon examination, the board find to be qualified (section 3). The practice of dentistry without a license from the board, by any person other than a practicing physician who is a graduate from the medical department of an incorporated college, is made a misdemeanor punishable by a fine not exceeding \$100 (sections 6, 7). It seems clear that the powers vested in the board by the act are of a judicial nature. The subject-matter which it is to pass upon is the qualification of applicants to practice dentistry. While all three of the members may hear and pass upon the question, only two are required to constitute a valid tribunal. An attempted exercise of jurisdiction by a less number is coram non judice and void. *State v. Richmond*, 26 N. H. 232, 234. It is agreed that the examination of the defendant was had before a single member of the board, and that the license which he holds was issued to him without the knowledge and approval of any other member. The decision of that member, not being authorized by the statute, is void, and the same is true of the license.

The Supreme Court, as a court of general superintendence to prevent and correct errors and abuses of inferior tribunals, has jurisdiction to entertain a proceeding to correct the error disclosed by the case. Pub. St. 1901, c. 204, § 2. The objection taken by the defendant that the plaintiffs are not authorized to bring such a proceeding for the state is well founded. It can be brought only by the Attorney General, and the state board of registration in dentistry is a necessary party defendant, because it is the official action of that board as a judicial tribunal which is attacked. In its present form, the proceeding cannot be maintained, and the decree for the plaintiffs is erroneous. Should the Attorney General see fit to adopt the proceeding, the state and the state board of registration can be made parties by amendment, and the proceeding will then be a direct attack by the state upon the judgment. If this is done, it is not probable any further hearing of the facts will be required. Upon the facts found, the state will be entitled to the decree asked for by the present plaintiffs.

Case discharged. All concurred.<sup>19</sup>

<sup>19</sup> See *United States v. Norsch* (C. C.) 42 F. 417 (1890).

## CHAPTER 2

### ADMINISTRATIVE DISCRETION

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#### SECTION 6.—CONSTRUCTION OF POWER

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JACOB'S (TOMLIN'S) LAW DICTIONARY, LONDON, 1809, VERBO DISCRETION: Where anything is left to any person to be done according to his discretion, the law intends it must be done with a sound discretion and according to law; and the Court of King's Bench hath a power to redress things that are otherwise done notwithstanding they are left to the discretion of those that do them. 1 Lil. Abr. 477.

Discretion is to discern between right and wrong, and therefore whoever hath power to act at discretion is bound by the rule of reason and law. 2 Inst. 56, 298.

And though there be a latitude of discretion given to one, yet he is circumscribed that what he does be necessary and convenient, without which no liberty can defend it. Hob. 258.

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#### STATE v. JUSTICES OF INFERIOR COURT OF MORGAN COUNTY.

Supreme Court of Georgia, 1854. 15 Ga. 408.

Lester Markland applied to the inferior court of Morgan county for an order for a license to retail spirituous liquors in that county, having paid for such license, and being ready to give the bond and security required. The court refused to grant the license, on the ground that the applicant was an unfit person to be so licensed—having been twice convicted of selling spirituous liquor to slaves, contrary to law.

On hearing this return to a mandamus nisi, Judge Hardeman refused to make the mandamus absolute. This decision is assigned as error.

STARNES, J. \* \* \* It is agreed that the first act on this subject, now of force in our state, was passed in 1791. This was entitled "An act for regulating taverns," etc. The first section provided that upon the petition of any person wishing to keep a tavern, or house

of entertainment, the justices of the inferior court, held for the county of such person's residence, shall "consider the convenience of such place intended for a tavern, and having regard to the ability of such petitioner to keep good and sufficient accommodations for travellers, their horses and attendants, may, at their discretion, grant a license," etc., provided that the applicant should enter into bond, with sufficient security, "conditioned for the keeping an orderly and decent house, with good and sufficient accommodation for travellers," etc. The second section required the rates of charges to be fixed by the court. The third provided a penalty for retailing without license. The fourth fixed the price to be paid for such license; and the fifth repealed conflicting acts, and gave to the corporations of Savannah and Augusta the right to regulate licenses in those cities. \* \* \*

Let us remark, also, that the limits of the discretion, by this act conferred upon the inferior court, are: (1) A consideration of the convenience of the locality intended for a tavern. (2) The ability of the petitioner to supply such tavern with proper accommodation for travellers, their horses and attendants. And that no discretion, whatever, is given the inferior court, by which to grant or refuse the license, according as the character of the applicant may be good or bad.

The only provision which seems to have been contemplated, as a protection against the grant of such license, to a person of bad moral character, was the requirement of bond and security, for the keeping an orderly and decent house. \* \* \*

Let the judgment be reversed.<sup>1</sup>

## PEOPLE ex rel. SHEPPARD v. ILLINOIS STATE BOARD OF DENTAL EXAMINERS.

Supreme Court of Illinois, 1884. 110 Ill. 180.

This is an original proceeding in this court for a mandamus. The petition therefor is as follows:

"The petitioner, Isaac N. Sheppard, a citizen of the state of Illinois, residing in the city of Paris, county of Edgar, in said state, complaining, shows unto the court that he is twenty-one years of age; that he became a student at the Indiana Dental College, an institution duly organized under the laws of the state of Indiana, located at the city of Indianapolis, in said state, on the 3d day of October, 1881, said institution being a college for the purpose of educating persons in the theory and practice of dentistry and dental surgery; that he attended said college as a student, as aforesaid, during his two full terms thereof, and pursued a course of study in the theory and practice of dentistry and dental surgery during all that time at said college, and that he completed said course of study, and was graduated from said col-

<sup>1</sup> Compare *State v. Hanlon*, 24 Neb. 608, 612, 39 N. W. 780 (1888).



lege on the 7th day of March, A. D. 1883, and thereupon, to wit, on the day last aforesaid, he received a diploma from the faculty of said Indiana Dental College, duly authenticated by the signatures of the faculty of said college and the officers thereof; that said Indiana Dental College is a reputable dental college, and during the time petitioner was a student therein, and at the time of issuing said diploma by the faculty of said dental college to petitioner, there was annually delivered at said college a full course of lectures and instruction in dental surgery. Petitioner further shows unto the court that desiring to engage in the practice of dentistry in this state, he afterwards, to wit, on or about the 18th day of March, 1883, presented his said diploma so received from the faculty of said Indiana Dental College, duly authenticated, to the Illinois State Board of Dental Examiners, and tendered to said board a fee of one dollar, as provided by law, and demanded that said board issue to him, the petitioner, a license to practice dentistry in the state of Illinois, as provided by law. Petitioner further shows to the court that it was the duty of said board of dental examiners, upon the presentation of said diploma, and the tender of the fee of one dollar, as aforesaid, to said board by said petitioner, and the demand, as aforesaid, to issue to petitioner a license to practice dentistry in the state of Illinois, and that the said board of dental examiners, not regarding their said duty in this behalf, thereupon, to wit, on the day last aforesaid, refused to issue to petitioner a license to practice dentistry in this state, and have continually refused, and still do refuse, to issue to petitioner such license. Petitioner further shows unto the court that the members of the said board of dental examiners are G. V. Black, A. W. Harlan, O. Wilson, J. J. Jennelle and George H. Cushing, and that by the failure and refusal of said board of dental examiners to so issue and grant petitioner a license to practice dentistry, as aforesaid, he, the petitioner, has been prevented from practicing dentistry in this state, as he is lawfully and by right entitled to do; that he has qualified himself for the practice of said profession at great expenditure of time and money, and depends upon the same for a living. Petitioner further shows unto the court that the determination of the questions involved in this petition is not only one of great importance to him individually, but is also a matter of public importance, as numbers of the graduates of said dental college, citizens of this state, and circumstanced like petitioner, desire to practice dentistry in this state, and are prevented therefrom by like refusal of said board of dental examiners. Wherefore being without other legal remedy, petitioner prays for a writ of mandamus, directed to the Illinois State Board of Dental Examiners, commanding them to forthwith receive from petitioner the fee of one dollar, and thereupon to issue to petitioner a license to practice dentistry in the state of Illinois, and to deliver the same to petitioner, and that such further order may be made in the premises as justice may require."

The Attorney General demurs to the petition.

Mr. Justice SCHOLFIELD delivered the opinion of the court.

It is provided by the first section of an act approved May 30, 1881, entitled "An act to insure the better education of practitioners of dental surgery, and to regulate the practice of dentistry in the state of Illinois," "that it shall be unlawful for any person who is not at the time of the passage of this act engaged in the practice of dentistry in this state, to commence such practice, unless such person shall have received a diploma from the faculty of some reputable dental college duly authorized by the laws of this state, or of some other of the United States, or by the laws of some foreign country, in which college or colleges there was, at the time of the issue of such diploma, annually delivered a full course of lectures and instruction in dental surgery." And in the sixth section of the same act, after providing for examination before the board of dental examiners of all applicants for license to practice dentistry, is the following provision: "But said board shall, at all times, issue a license to any regular graduate of any reputable dental college, without examination, upon the payment by such graduate to the said board of a fee of one dollar." Other provisions of the act prohibit any person to practice dentistry without a license from the board, except such as are properly enrolled as having been practitioners at the time of the passage of the act.

The contention of the relator is that the board of dental examiners have no power to decide what is, or what is not, a "reputable dental college"—that the law has itself defined what is a "reputable dental college," in providing that it shall be "duly authorized by the laws of this state, or some other of the United States, or by the laws of some foreign country, in which college \* \* \* there was, at the time of the issue of such diploma, annually delivered a full course of lectures and instruction in dental surgery." We are unable to appreciate the force of this position. The word "reputable" would seem to be used here to express the meaning ordinarily attached to it. If it had been intended that a diploma from any dental college, or a diploma from any dental college "duly authorized by the laws of this state, or some other of the United States, or by the laws of some foreign country, in which college \* \* \* there was, at the time of the issue of such diploma, annually delivered a full course of lectures and instruction in dental surgery," we must presume the language would have so said. By using the word "reputable," we must presume the General Assembly meant "reputable." And since it is not used as being the equivalent and convertible for the other requirements in regard to the college, but as in addition thereto, we must presume it was intended to be so construed.

As a part of the current history of the times, and as an aid in arriving at the legislative intention, we know there were colleges of different kinds authorized by the laws of states in which they were located, in which there were pretended to be annually delivered full

courses of lectures and instruction upon the arts and sciences professed to be taught, that were not "reputable," because they graduated for money, frequently without any reference to scholarship. A diploma from such an institution afforded no evidence of scholarship or attainments in its holder. It was a fraud, and deserved no respect from anybody, and it was as against such diplomas the law was intended to protect the public, and therefore required that the colleges be "reputable." Whether a college be reputable or not is not a legal question, but a question of fact. So, also, are the requirements in regard to the annual delivery of full courses of lectures and instruction. These questions of fact are, by the act, submitted to the decision of the board—not in so many words, but by the plainest and most necessary implication. Their action is to be predicated upon the existence of the requisite facts, and no other tribunal is authorized to investigate them, and of necessity, therefore, they must do so. The act of ascertaining and determining what are the facts, is in its nature judicial. It involves investigation, judgment, and discretion.

The office of the writ of mandamus is, in general, to compel the performance of mere ministerial acts prescribed by law. It lies, however, also to subordinate judicial tribunals, to compel them to act where it is their duty to act, but never to require them to decide in a particular manner. It is not, like a writ of error or appeal, a remedy for erroneous decisions. *Judges of Oneida Common Pleas v. People*, 18 Wend. (N. Y.) 92. And, as is said by the court in *People v. Common Council of Troy*, 78 N. Y. 33, 34 Am. Rep. 500: "This principle applies to every case where the duty, performance of which is sought to be compelled, is in its nature judicial, or involves the exercise of judicial power or discretion, irrespective of the general character of the officer or body to which the writ is addressed. A subordinate body can be directed to act, but not how to act, in a matter as to which it has the right to exercise its judgment. The character of the duty, and not that of the body or officers, determines how far performance of the duty may be enforced by mandamus. Where a subordinate body is vested with power to determine a question of fact, the duty is judicial, and though it can be compelled by mandamus to determine the fact, it can not be directed to decide it in a particular way, however clearly it be made to appear what the decision ought to be." See, also, *Kelly et al. v. City of Chicago*, 62 Ill. 279.

Illustrations of the principle will be found in *People v. Common Council of Troy*, *supra*; *Freeman v. Selectmen*, 34 Conn. 406; *Hoole v. Kinkead*, 16 Nev. 217; *Bailey v. Ewart*, 52 Iowa, 111, 2 N. W. 1009; *Berryman v. Perkins*, 55 Cal. 483; *People v. Contracting Board*, 27 N. Y. 378, and other cases cited in argument by the Attorney General.



The demurrer here does not admit that the board of dental examiners found that the college at which the relator was graduated was reputable, although it does admit, that [i. e., that he was graduated] to be the fact. But since the board cannot be compelled to decide the question that way, although the evidence might clearly sustain it in doing so, there is no ground for mandamus.

The demurrer must be sustained, and the petition dismissed.  
Demurrer sustained.<sup>2</sup>

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AYERS v. HATCH, Mayor, et al.

Supreme Judicial Court of Massachusetts, 1900. 175 Mass. 489, 56 N. E. 612.

Petition for mandamus by Henry W. Ayers against Arthur W. Hatch, Mayor, and others, to compel reinstatement to the office of City Assessor of the City of Everett. Dismissed.

MORTON, J. \* \* \* The remaining question is whether the removal was valid under the city charter, which provides that "any officer so appointed [i. e. by the mayor] may be removed by the mayor for such cause as he shall deem sufficient and shall assign in his order of removal, and the removal shall take effect upon the filing of the order therefor in the office of the city clerk and the service of a copy of such order upon the officer removed, either personally or at his last and usual place of abode." St. 1892, c. 355, § 29. The petitioner was appointed by the mayor. The charter provides that "the mayor shall be the chief executive officer of the city, and the executive powers of the city shall be vested in him and shall be exercised by him either personally or through the several officers and boards in their respective departments, under his general supervision and control." The responsibility for the due and proper administration of the affairs of the city is thus placed largely upon him, and, consistently therewith, he is given the power of removal. The fact, however, that removals are to be for cause, repels the idea of removal at pleasure, even though the sufficiency of the cause is for him to decide.

The question then arises, what jurisdiction has this court in regard to removals? The answer, it seems to us, is this: Cause implies, we think, a reasonable ground of removal, and not a frivolous or wholly unsatisfactory or incompetent ground of removal. If the cause assigned is a reasonable one, then, whether, under the circumstances, it is sufficient to justify a removal, is for the mayor to

<sup>2</sup> Accord: *State ex rel. Kirchgessner v. Board of Health of Hudson County*, 53 N. J. Law, 594, 22 Atl. 226 (1891); also, as to "suitable" persons in licensing sale of intoxicating liquors, *Batters v. Dunning*, 49 Conn. 479 (1882). But see, as to holding promotional examinations, when practicable, *People ex rel. Williams v. Errant*, 229 Ill. 56, 82 N. E. 271 (1907).

decide, and his decision is final. But whether the cause assigned constitutes, of itself, as matter of law, ground for removal, is a question for this court to determine. In the present case the cause assigned was "the good of the service," and manifestly, it seems to us, that was good ground for removal. The natural inference would be that in some respect the petitioner had failed to perform his duties, or was incompetent or inefficient, or was an unsuitable person for the position to which he was appointed. If the charter provided, as in the New York cases relied on by the petitioner (*People v. Mayor*, etc., of New York, 19 Hun, 441; *Same v. Nichols*, 79 N. Y. 582; *Same v. Board of Fire Com'rs of City of New York*, 12 Hun, 500), that removals should be "for cause, and after an opportunity to be heard," no doubt he would have been entitled to a particular statement on the grounds embraced in the cause assigned. But we do not see how it can be said that the cause assigned is not in law a ground for removal.

The result is that we think that the petition should be dismissed. So ordered.<sup>3</sup>

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HARRISON, MAYOR, et al. v. PEOPLE ex rel. RABEN.

Supreme Court of Illinois, 1906. 222 Ill. 150, 78 N. E. 52.

Mandamus by the People, on relation of Henry Raben, to compel Carter H. Harrison and others, as Mayor, City Clerk, and City Collector of the City of Chicago, to issue a dramshop license to relator. From a judgment of the Appellate Court, affirming a judgment, awarding the writ, respondents appeal. Reversed.

The people, on the relation of Henry Raben, filed a petition in the superior court of Cook county against the appellants, as mayor, city clerk, and city collector of the city of Chicago, for a writ of mandamus to compel them to issue to the relator a license to keep a dramshop at 345 East Division street, in said city. The respondents answered the petition, and upon a hearing the court awarded the writ as prayed. On appeal to the Appellate Court for the First District that order was affirmed, and the respondents now bring the case to this court by a further appeal.

The case was heard in the superior court upon an agreed state of facts, as follows:

"The only ordinance of the city of Chicago regulating the matter of granting licenses to keep dramshops is the following:

"1175. The mayor of the city of Chicago shall from time to time grant licenses for the keeping of dramshops within the city of Chicago to persons who shall apply to him in writing therefor and shall furnish evidence satisfying him of their good character. Each

<sup>3</sup> See, also, *Re Guden*, 171 N. Y. 529, 64 N. E. 451 (1902).

applicant shall execute to the city of Chicago a bond, with at least two sureties to be approved by the city clerk or city collector, in the sum of \$500, conditioned that the applicant shall faithfully observe and keep all ordinances in force at the time of the application or thereafter to be passed during the period of the license applied for, and will keep closed on Sundays all doors opening out upon any street from the bar or room where such dramshop is to be kept, and that all windows opening upon any street from such bar or room shall on Sundays, except between the hours of one o'clock a. m. and five o'clock a. m., be provided with blinds, shutters or curtains, so as to obstruct the view from such street into such room. Nor shall any windows be painted or covered in any manner so as to obstruct the view from such street into such room. No application for a license shall be considered until such bond shall have been filed.'

"It is admitted that the petitioner made his application for a license to keep a dramshop at the place in question, and that in so doing he did everything required of him by the laws or ordinances; that no question was or is made of the sufficiency of the bonds tendered by petitioner, or of his good character; and that his application was refused solely because the place where he proposed to keep his dramshop is immediately next to the grounds of the Lyman Trumbull School, one of the public schools of the city, the mayor being of opinion that he has a right to refuse a license when, in his judgment, the place in which it is proposed to keep a dramshop is one where a dramshop will be a detriment and an injury to the neighborhood and offensive to the best interests of society. It is further admitted that the south school building has not been used regularly in the past two years; that it has not been used but two or three times, though it is ready for use; that some of the rooms in the north school building are not used, as there are not enough scholars to require the use of the whole building; that the property is held for school purposes and intended for use as a school, and that the location of the proposed saloon with reference to the school and the surroundings is truthfully set out in the following plat."

The plat referred to is immaterial in the decision of the case.

WILKIN, J. (after stating the facts). The only question presented by this record for our decision is whether, under the ordinance set forth in the foregoing statement of facts, the mayor of the city of Chicago is authorized to exercise a discretion in the granting of a license to keep a dramshop, or whether, on the presentation of an application for such a license showing that the requirements of the ordinance have been complied with, he is compelled to grant the license.

It must be conceded that the business of keeping a saloon or dramshop is one which no citizen has a natural or inherent right to pursue, but is the subject of legislative restriction, regulation, and control. *Schwuchow v. City of Chicago*, 68 Ill. 444. Of course,



where an ordinance authorizes the issuing of a license to keep a dramshop upon certain terms and conditions, the authorities authorized to grant the license cannot arbitrarily refuse the same, nor discriminate between persons, places, and regulations pertaining to the business, without reasonable grounds therefor. *Zanone v. Mound City*, 103 Ill. 552. We are, however, of the opinion that there is vested in such authorities, unless expressly restricted by the language of the ordinance, a discretionary power, which may be reasonably exercised in the granting or refusing to issue a license.

The question does not seem to have been directly passed upon by this court, but the authorities from other states fully sustain this reasonable construction. In many of these cases the language of the law or ordinance authorizing the granting of the license is that, upon the doing of certain things, the licensing officer or body shall grant the license; but the decisions are to the effect that, nevertheless, a discretion exists in such officer or body, and that they will not be compelled to issue a license when in their discretion, reasonably and fairly exercised, the license has been refused. *Leigton v. Maury*, 76 Va. 865; *People v. Board of Excise*, 91 Hun, 94, 36 N. Y. Supp. 678; *Sherlock v. Stuart*, 96 Mich. 193, 55 N. W. 845, 21 L. R. A. 580; *Attorney General v. Justices*, 27 N. C. 315; *Muller v. Commissioners*, 89 N. C. 171; *Hillsboro v. Smith*, 110 N. C. 417, 14 S. E. 972; *Perry v. Salt Lake City*, 7 Utah, 143, 25 Pac. 739, 998, 11 L. R. A. 446; *Eslinger v. East*, 100 Ind. 434.

This question was before the Appellate Court for the First District in the case of *Swift v. People*, 63 Ill. App. 453, and that court, in a well-considered opinion, held that the mayor of the city of Chicago could not be compelled by mandamus to issue a license to keep a dramshop in a neighborhood occupied almost exclusively by residents, and where a saloon would be a nuisance.

The trial court in this case held propositions of law to the effect that the mayor had the right to exercise a discretion in granting or refusing the license, among others the following: "It is within the mayor's right to refuse to grant a license to keep a dramshop at a place where it will be so close to a school as to be a detriment and injury to the neighborhood or offensive to the best interests of society." Notwithstanding this holding, which we think a correct announcement of the law, the writ was granted. The judgment could only be reconciled with the holdings as to the law of the case, upon the theory that the discretionary power vested in the mayor had been abused. But that position is untenable. By the stipulation it is agreed that the relator sought a license to keep his saloon immediately next to the grounds of the Lyman Trumbull School, one of the public schools of the city. The mayor was of the opinion that he had a right to refuse a license when in his judgment the place in which it is proposed to keep a dramshop will be a detriment and in-

jury to the neighborhood and offensive to the best interests of society.

It is true that it is stipulated that the school building has not been used regularly in the past two years, though it is ready for use, and that some of the rooms in the north school building are not used, as there are not enough scholars to require the use of the whole building. Both school buildings are on the same grounds, and it is agreed that the purpose is to establish a saloon in the immediate vicinity of these school buildings and the playgrounds. We apprehend that no one will seriously contend that a saloon adjacent to or in the immediate neighborhood of public schools will not tend, in a greater or less degree, to demoralize and disturb school children. We are clearly of the opinion that upon the facts in this case there was no such abuse of discretion on the part of the mayor as would justify the courts in compelling him to grant the license applied for.

The judgment of the Appellate Court will be reversed, and the cause will be remanded to the superior court, with directions to dismiss the petition.

Judgment reversed.<sup>4</sup>

## SECTION 7.—CONSIDERATIONS GUIDING DISCRETION

### REG. v. BOTELER et al.

Court of Queen's Bench, 1864. 4 Best & S. 959.

\*Poland obtained a rule on behalf of the Board of Guardians of the Bridgend and Cowbridge Union, calling upon Robert Boteler and John Samuel Gibbon, Esquires, justices of the peace for the county of

<sup>4</sup> Accord: *Muller v. Com'rs of Buncombe Co.*, 89 N. C. 171 (1883). See, also, *People ex rel. Schwab v. Grant*, 126 N. Y. 473, 27 N. E. 964 (1891).

In other cases, in accordance with the terms of the statute, the issue of the liquor license has been held to be a ministerial duty. *State ex rel. Fitzpatrick v. Meyers*, 80 Mo. 601 (1883); *McLeod v. Scott*, 21 Or. 94, 26 Pac. 1061, 29 Pac. 1 (1891); *Henry v. Barton*, 107 Cal. 535, 40 Pac. 798 (1895).

In New York, the liquor tax law of 1896 (Laws 1896, c. 112) made the right to sell liquor independent of any administrative discretion. See section 19 of act as amended in 1897 (Laws 1897, c. 312); *People ex rel. Belden Club v. Hilliard*, 28 App. Div. 140, 50 N. Y. Supp. 909 (1898).

Discretion as to renewal of licenses, see the elaborate opinions in *Sharp v. Wakefield* [1891] App. Cas. 173. The matter was subsequently dealt with by the English Licensing Act, 1904. See article on Property in Licenses, 24 Law Quarterly Review, 49.

Further, regarding the judicial control of administrative discretion, see cases under mandamus.

The word "may" is often construed as "shall." See *Mason v. Fearson*, 9 How. 248, 13 L. Ed. 125 (1850); *Lewis' Sutherland*, Statutory Construction, §§ 634-640.

Glamorgan, and Robert Charles Nicholl Carne, overseer of the poor of the parish of Nash, in that Union, to show cause why the said justices should not issue their warrant to levy, by distress and sale of the goods and chattels of the said R. C. N. Carne, the sum of £14. 11s., the amount ordered by the guardians of the poor of the Union to be paid by him from the poor rates of the parish, towards the relief of the poor thereof, and as the contribution of the parish to the common fund of the Union. \* \* \*

Carne having refused to obey the order, the guardians obtained a summons against him under St. 2 & 3 Vict. c. 84, § 1. Upon the hearing of the summons, on the 6th October, 1863, he appeared in person, and, evidence having been given in support of the application, Carne contended that the proof of notice to him of his appointment as overseer of the parish of Nash was not sufficient, but the justices decided that it was. Carne did not produce any evidence, but contended that, as the parish of Nash had not at that time any paupers chargeable to it, it was unjust and unreasonable that the ratepayers thereof should be called upon to pay anything towards the expenses of the Union; that it was in the discretion of the justices whether payment of the contribution should or should not be enforced; and urged upon them that, as the order for contribution was unjust, they should exercise that discretion and refuse to enforce payment. The justices, addressing Carne, said: "We have given the matter our best consideration and think you have shown sufficient cause to justify us in refusing the warrant." They then, at the request of Carne, added to their decision a statement that they refused the warrant in the exercise of their discretion.

St. 2 & 3 Vict. c. 84, § 1: "In every case in which any contribution by overseers or other officers of any parish of monies required by the board of guardians or persons acting as guardians for such parish, or for any Union which shall include such parish for the performance of their duties, shall be in arrear, it shall be lawful for any two justices acting within the district wherein such parish shall be situate, on application under the hand of the chairman or acting chairman of such board, to summon the said overseer or other officers to show cause, at a special sessions to be summoned for the purpose, why such contribution has not been paid, and after hearing the complaint preferred under the authority of such chairman or acting chairman, and on behalf of such board, if the justices at such sessions shall think fit, by warrant under their hands and seals to cause the amount of the contribution so in arrear, together with the costs occasioned by such arrear, to be levied and recovered from the said overseers or other officers, or any of them, in like manner as monies assessed for the relief of the poor may be levied and recovered, and the amount of such arrear, together with the costs as aforesaid, when levied and recovered, to be paid to the said board."



COCKBURN, C. J. I do not intend in the slightest degree to encroach upon the doctrine that, where magistrates have a discretionary power to decide whether they will do an act or not, this court will not order them to do it when they have exercised their discretion upon the merits of the matter. But it is clear, upon the facts of the present case, that they have not exercised that discretion which in law they would have been justified in exercising. This extra-parochial place, having been made part of a Union, became liable by law to contribute its share to the general expenses of the Union; and the magistrates, having that fact established before them, ought to have issued their warrant. (It is equally clear that the reason why they did not do so was because they were invited to exercise their discretion on a matter which was not within it.) They proceeded upon the ground that the annexation of this extra-parochial place to the Union was unjust; in other words, that the operation of the act of Parliament under which that was effected was unjust. Their decision virtually amounts to this: "We know that upon all other grounds we ought to issue our warrant, but we will take upon ourselves to say that the law is unjust, and therefore, we will not issue it." That is not a tenable ground on which this court can allow magistrates to decline to exercise their discretion according to law. It would be an evil example if we held that they might thus arbitrarily and illegally exercise their discretion; and therefore this rule must be made absolute, with costs.<sup>5</sup>

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UNITED STATES FIDELITY & GUARANTY CO. v. LINEHAN, Insurance Com'r.

Supreme Court of New Hampshire, 1904. 73 N. H. 41, 58 Atl. 956.

Mandamus by the United States Fidelity & Guaranty Company against John C. Linehan, insurance commissioner. Writ granted.

The plaintiff is incorporated under the laws of Maryland, and under authority of its charter is engaged outside of New Hampshire in the business of a fidelity and surety company and in the burglary insurance business. It was licensed to do business as a fidelity and surety company in this state on February 17, 1897, since which date its license has been renewed continuously, except for a short time after May 29, 1900. On July 16, 1900, and on other dates since then, the plaintiff requested the defendant to issue to it a license to do a burglary insurance business in New Hampshire, in addition to the license to do fidelity and guaranty business, and the defendant refused to do so. It has complied with all the provisions of the statutes which are prerequisite to the issuance of the license prayed for, if it is entitled thereto.

<sup>5</sup> See *Martin v. Symonds*, 4 Misc. Rep. 6, 23 N. Y. S. 689 (1893). See, however, *John Giles' Case*, 2 Str. 881 (1731); *Ex parte Persons*, 1 Hill (N. Y.) 655 (1841).

The defendant, acting in good faith in his capacity as insurance commissioner, refused to issue a license to the plaintiff company. While he believed that, as a general rule, speaking not of to-day, but of the future, no company that does a surety business in combination with any other business is a safe and reliable company, he was satisfied that the plaintiff was a safe, reliable company, entitled to public confidence at present, and should consider it as such if permitted to do burglary insurance business in New Hampshire. He also believed that it would be contrary to public policy to permit such a combination of surety and other insurance business in this state. This belief was based upon the length of time that must necessarily elapse before the ultimate liability on surety bonds can be ascertained, and upon the lack of statistics from which to compute the proper relation between reserve fund and liability. But he believed this company would be able to do its entire business with perfect safety if permitted to do burglary insurance business in New Hampshire in addition to its other lines, and would continue so, unless the company added more hazardous lines than the one now proposed; but he objected to licensing this company because he believed that it was against public policy, for the reason that the combination of surety business with other insurance business was unsafe as a general proposition.

WALKER, J. The plaintiff is a Maryland corporation, and under its charter it is authorized to carry on in combination the business of a surety company and that of a burglary insurance company. Both classes of business properly fall under the general designation of insurance. The plaintiff is an insurance company, empowered by its charter to do a dual insurance business. But its charter does not confer upon it power to engage in business in New Hampshire. Such power, if it exists, is derived from the expressed or implied will of the Legislature of this state. It is a privilege or license which the Legislature may withhold from corporations like the plaintiff, organized in other states (*Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650); but, in the absence of express legislation against the exercise of the privilege by such corporations, it is generally held that they acquire the right by comity, or that legislative silence upon the subject is equivalent to permission (2 Mor. Corp., §§ 960, 961; *Cowell v. Springs Co.*, 100 U. S. 55, 59, 25 L. Ed. 547). A state policy may be as thoroughly established in this way as by positive enactment. If the Legislature does not see fit to prohibit a foreign corporation from carrying its business here, when it is not repugnant to common-law principles, it, in effect, declares the public policy of the state to be favorable to its engaging in business here. The presumption of legislative intention, founded upon the doctrine of comity, affords ample evidence in support of that conclusion.

It is not claimed that there is any legislation in this state which prohibits an insurance company of another state from carrying on here the business of a surety company or that of a burglary insurance com-

pany. In accordance, therefore, with the principle above noted, it follows that it is the policy of the state to permit companies to engage here in those lines of insurance, restricted only by their charter provisions and such regulations or conditions as the Legislature has enacted relating to the business of insurance. By comity they are invested with a qualified right to do business here, of which they cannot be deprived except by legislative prohibition. These principles have received legislative sanction in statutes regulating the business of foreign insurance companies and surety companies. Pub. St. 1901, cc. 169, 172.

Nor has the Legislature furnished evidence of a policy to exclude insurance companies from the state which combine two or more distinct classes of insurance business. In *United States, etc., Co. v. Linehan*, 70 N. H. 395, 47 Atl. 611, it was held that a foreign surety company may be licensed to transact that business in this state, although authorized by its charter to engage in other business. The Legislature had not made the fact that it was authorized by its charter to do several kinds of insurance business conclusive evidence against its right, by comity, to do one kind. In *Employers' Assurance Corp. v. Merrill*, 155 Mass. 404, 405, 29 N. E. 529, it is said: "Before the year 1879, foreign companies, authorized by their charters to transact more than one class of insurance, and admitted here, were not restricted in their operations by our statutes; but since the passage of the statute of 1879 (page 484, c. 130), such companies, with exceptions not material to the present case, have been required to elect one class or kind of business, and allowed to transact here only that class or kind." And the court further say (page 410, 155 Mass., page 531, 29 N. E.), that originally "foreign companies, under certain conditions not restricting the classes of risks which they might write, were allowed to transact business here. A license or certificate of authority from the insurance commissioner was first provided for by the statute of 1878 (page 93, c. 130, § 6), and the foreign company to whom it was issued was thereupon 'authorized to transact business in this commonwealth,' and was restricted only by its charter."

A similar result was reached in *People v. Company*, 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295, where it was held that, in the absence of any prohibition in the statute against the business of multiform insurance, the comity that prevails between the states permits a foreign corporation to do such insurance in Illinois, although the statute of that state does not authorize the formation of companies for that purpose. See, also, *State v. Insurance Co.*, 39 Minn. 538, 41 N. W. 108. By comity the plaintiff acquired the right to carry on its dual business in this state, subject to the statutory regulations imposed upon foreign insurance companies; and its right in this respect, until revoked by the Legislature, is as secure and stable as though it had been acquired by express grant from that body.

As the Legislature has, in effect, authorized foreign insurance corporations carrying on more than one line of insurance to exercise their



charter powers in this state, subject to certain statutory regulations, it is clear that they cannot be excluded by the commissioner simply upon the ground that he believes that such combinations, as a general rule, are opposed to the public interest. If such a company has complied with the prescribed regulations, and "the commissioner is satisfied that the company has the requisite capital and assets, and that it is a safe, reliable company, entitled to confidence, he shall grant a license to it to do insurance business by authorized agents within the state, subject to the laws of the state, until the first day of April thereafter." Pub. St. 1901, c. 169, § 6. If, upon examination, he finds that the company has complied with the requirements of the statute, and he is satisfied that it has the requisite capital and assets, and "that it is a safe, reliable company, entitled to confidence," it is his duty to grant the license. The finding of these facts in favor of the company renders his opinion as to the general nature of the insurance business it is authorized by its charter to do immaterial. The duty imposed upon him is to carry out the purpose of the Legislature, judicially ascertained, and that purpose does not authorize him officially to pass upon the general question of the utility of permitting foreign insurance companies to do business in this state.

The nature of the applicant's business is undoubtedly to be considered by the commissioner as evidence upon the question of its reliability as a business corporation, and it is conceivable that that alone might warrant his finding of the fact of its unreliability. Also, the difficulty of computing the ratio between its reserve fund and its liabilities is an evidentiary fact bearing upon the question of its financial soundness. But when, upon the evidence before him, he is satisfied, as he was in this case, that the company "was a safe, reliable company, entitled to public confidence at present," that "its methods of business were safe and conservative," and that it "would be able to do its entire business with perfect safety if permitted to do burglary insurance business in New Hampshire in addition to its other lines, and would continue so unless the company added more hazardous lines than the one now proposed," he cannot exclude it on the ground that it is theoretically unreliable. If by reason of the dual character of its business he was unable to determine the question of its reliability, or if he was satisfied that such a business combination rendered this company unsafe in fact for public patronage, his refusal to grant it a license would seem to have been amply justified.

The evidence which satisfies him that the company is entitled to public confidence shows that his theory that such companies are not safe and reliable is not of universal application, and ought not to be invariably followed. The character of its business does not afford conclusive proof that it is unsafe. It may be safe in the statutory sense, notwithstanding it does a dual business; and the commissioner's finding that it is safe and reliable, as a matter of fact, renders the objection that it is theoretically unsafe of little practical consequence. However it may be with other similar companies, the commissioner finds

that this company possesses all the statutory requirements for carrying on its business in this state, comity favors its admission, and hence it is entitled to the license sought as a matter of legal right. It only remains for the commissioner to perform the ministerial duty of issuing the license, and that duty may be appropriately enforced in this proceeding. *Boody v. Watson*, 64 N. H. 162, 9 Atl. 794; *Hart v. Folsom*, 70 N. H. 213, 217, 47 Atl. 603; *Manchester v. Furnald*, 71 N. H. 153, 158, 51 Atl. 657.

Petition granted. All concurred.

*Over*  
*the*  
LONDON COUNTY COUNCIL, v. BERMONDSEY BIOSCOPE CO.

High Court of Justice, Kings Bench Division. [1911] 1 K. B. 445.

PICKFORD, J. I am of the same opinion. It is said that the condition as to closing the premises on Sundays, Good Friday, and Christmas Day is ultra vires of the county council upon the ground, as I understand, that their powers under the Cinematograph Act, 1909, are confined to inserting such conditions as may be necessary or advisable for securing safety at the exhibition. Section 2 of the act gives the county council power to insert in the license granted by them such terms and conditions and such restrictions as, subject to regulations of the Secretary of State, they may determine. If that enactment stood alone, I do not see how it could be denied that, subject to the regulations of the Secretary of State, the county council might impose such conditions, so long as they were not unreasonable, as they thought right. The section, however, does not stand alone. The title of the act is "An act to make better provision for securing safety at cinematograph and other exhibitions"; and then comes section 1, which I need not read again. It is argued that the title shews that everything which has to be done under the act must be done for the purpose of securing safety, and that section 1 strengthens that view because the regulations to be made by the Secretary of State are confined to regulations for securing safety. I do not think that that argument is sound. Section 1 expressly limits the power of the Secretary of State to make regulations "for securing safety," whereas there is no such limitation imposed upon the power of the county council under section 2. It may well be that the Legislature thought that, in addition to regulations which are specially directed to securing safety, it would be a further means of securing safety to give to the county council a free power to impose such terms, conditions, and restrictions as they thought right. It seems to me that the act does, for the purpose of securing safety, give to the county council this general power, though such terms, conditions, and regulations may not directly point to the question of safety. The appeal should be allowed.

AVORY, J. I am of the same opinion. In recent years the question whether the London County Council have power to attach to a music and dancing license the condition that the premises shall not be opened on Sundays has been the subject of frequent consideration, and notwithstanding the efforts which I know have been made to get that condition withdrawn, no one has been bold enough to come into court and say that the London County Council have no power to impose that condition in a music-hall license. I have been unable to discover any distinction for this purpose between the condition which is imposed in the ordinary case of a music-hall license and the condition which is impugned in the present case. At first sight it sounds a little startling to say that a condition which requires an applicant for a license to obey the law is *ultra vires*. That is all that this condition does. It requires him to obey the general law regulating places of entertainment. It is said that it is *ultra vires* because it goes beyond the title of the act. The effect of that argument would be that the license could only contain conditions which are a repetition of the regulations made by the Secretary of State, because those regulations completely cover the whole purpose of securing safety. In my opinion it was contemplated by section 2 that the license might contain other conditions besides those set forth in the regulations of the Secretary of State, and therefore that contention fails.

Appeal allowed.

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LLOYD v. RAMSAY, Secretary of State, et al.

Supreme Court of Iowa, 1921. 192 Iowa, 103, 183 N. W. 333.

Appeal from a decree in a suit in certiorari to review the action of the Secretary of State and the Executive Council of the State of Iowa in refusing to file certain articles of incorporation. Reversed.

FAVILLE, J. The appellant W. C. Ramsay is Secretary of State, the appellant Nathan E. Kendall is Governor, W. J. Burbank is State Treasurer, and Glenn C. Haynes is State Auditor, and said four officials constitute the Executive Council of the State of Iowa. On or about the 19th day of January, 1921, the appellee caused to be filed in the office of the county recorder of Polk county, Iowa, for record, certain articles of incorporation executed by himself, as sole incorporator, and seeking to incorporate under the name and style of the "Federal Oil Company." After said articles of incorporation had been filed and recorded in the office of the county recorder of Polk county, Iowa, they were presented by the appellee to the Secretary of State for the purpose of having the same approved and filed and a certificate issued by the said Secretary of State.

On or about January 19, 1921, the Secretary of State notified the appellee of his disapproval of said articles of incorporation, and informed the appellee how the articles could be amended so that the same



would meet with his approval. Shortly thereafter the appellee commenced an action against the said Secretary of State, praying for a writ of mandamus to compel the Secretary to file said articles. A demurrer to the appellee's petition in mandamus was sustained by the court and thereafter the Secretary of State submitted said articles of incorporation to the Executive Council of the State, as provided by section 1610 of the Code and amendments thereto. In so submitting the same to the Executive Council; the Secretary of State advised said Executive Council that—

"Inasmuch as the two classes of stock were so disproportionate, it occurred to me that the preferred stock was preferred in name only, and for this reason, on the ground of public policy, I refused to file said articles."

Thereafter a hearing was had before said Executive Council, and the records of said Executive Council in respect to said matter recite:

"After giving due consideration to the evidence submitted and arguments of counsel, Auditor Haynes moved that the council not approve the articles of incorporation of the Federal Oil Company, as the said articles were contrary to good business practice," which motion was duly carried. Thereafter the appellee amended his petition in said original action, and made the members of the Executive Council parties defendant, and prayed that a writ of certiorari be issued from the district court of Polk county, Iowa, commanding said defendants to certify to said court all of the records and proceedings in reference to said articles of incorporation, and asking that the order of said Executive Council be canceled, and that an order be issued, requiring the Executive Council to accept said articles of incorporation, and to require the Secretary of State, in his official capacity, to accept said articles and to issue a certificate of incorporation. Answer was filed to this petition as so amended, and upon the trial a decree was entered, canceling and setting aside the action of the Secretary of State in refusing to accept and file said articles of incorporation, and also the action of the executive in respect to said matter, and directing the Executive Council to adopt a resolution rescinding their former action and to pass a suitable resolution, directing the said Secretary of State to receive said articles of incorporation and file the same, and issue a certificate of incorporation. This appeal is prosecuted from the said decree.

I. The ultimate question for our consideration upon this appeal is whether or not the Secretary of State and the Executive Council of Iowa are clothed by legislative enactment with any power or authority to pass upon the propriety or advisability of granting a permit to a corporation to incorporate under the laws of the state of Iowa, or, are their functions in this respect only ministerial?

The matter of the creation of bodies corporate is one of ancient origin. In England the King's consent, either express or implied, has long been regarded as necessary to the creation of a corporation. 1 Black-

stone, Comm. p. 472. In the United States, corporations can be created and corporate powers granted only by or under authority of an act of the Legislature. Our Constitution (article 8, § 1) provides:

"No corporation shall be created by special laws; but the General Assembly shall provide by general laws, for the organization of all corporations hereafter to be created, except as hereinafter provided."

\* Our original statutes on the matter of the formation of corporations were comparatively simple, and had no provisions regarding the submission of the articles to the Secretary of State or Executive Council, and no provision for the granting of any permit or certificate. Code of 1851, c. 43. The statutes in regard to the manner of incorporation have been frequently amended. The present statute governing the matter under consideration is section 1610 of the Code Supplement 1913. Said statute provides that before commencing any business, except their own organization, articles of incorporation must be adopted, which must be filed, acknowledged, and recorded in the office of the recorder of deeds of the county where the principal place of business is to be. The recorder shall indorse on said articles the time when the same were filed and the book and page where the record will be found. The parts of the statute material to this appeal are as follows:

"Said articles thus indorsed shall then be forwarded to the Secretary of State, and be by him recorded in a book kept for that purpose.  
\* \* \* When articles of incorporation are presented to the Secretary of State for the purpose of being filed, if he is satisfied that they are in proper form to meet the requirements of law, that their object is a lawful one and not against public policy, that their plan for doing business, if any be provided for, is honest and lawful, he shall file them; but if he is of the opinion that they are not in proper form to meet the requirements of the law, or that their object is an unlawful one, or against public policy, or that their plan for doing business is dishonest or unlawful, he shall refuse to file them. Should a question of doubt arise as to the legality of the articles, he shall submit them to the Attorney General whose duty it shall be to forthwith examine and return them with an opinion in writing touching the point or points concerning which inquiry has been made of him. If such opinion is in favor of the legality of the articles, and no other objections are apparent, they shall then, upon payment of the proper fee, be filed and otherwise dealt with as the law provides. If, however, such opinion be against their legality they shall not be filed. Upon rejection of any articles of incorporation by the Secretary of State, except for the reason that they have been held by the Attorney General to be illegal, they shall, if the person or persons presenting them so request, be submitted to the Executive Council, which shall, as soon as practicable, consider the said articles and if the council determines that the articles are in proper form, of honest purpose, not against public policy, nor otherwise objectionable, it shall so advise the Secretary of State in

writing, whereupon he shall, upon the payment of the proper fees, file the same and proceed otherwise as the law directs; but if the council sustains the previous action of the Secretary of State in rejecting said articles, such decision by the council shall be reported to the Secretary of State in writing, and he shall then return said articles to the person or persons presenting them with such explanation as shall be proper in the case."

Under the foregoing statute, it is to be noticed that the articles of incorporation are first to be presented to the Secretary of State for the purpose of being filed. The statute requires that the said Secretary of State shall be "satisfied" of certain things before filing the same. The things of which the secretary is required to be "satisfied" are as follows: (1) That the articles are in proper form to meet the requirements of law; (2) that their object is a lawful one; (3) that their object is not against public policy; (4) that the plan for doing business is honest and lawful.

The statute provides that if the Secretary of State "is of the opinion" that the articles fail in any one of the four particulars enumerated "he shall refuse to file" the same. It will also be observed that provision is made for securing the opinion of the Attorney General in regard to the legality of the articles, and the statute also provides that if the opinion of the Attorney General is in favor of the legality of the articles, "and no other objections are apparent," they shall then be filed.

The statute also further provides that if the Secretary of State shall reject the same for any reason except that they have been held by the Attorney General to be illegal, then the articles shall be submitted to the Executive Council. The law provides that the Executive Council shall "consider the said articles," and also "determine four things in respect to said articles before the same can be filed." As stated in the statute, these are: (1) That the articles are in proper form; (2) that they are of honest purpose; (3) that they are not against public policy; (4) that they are not otherwise objectionable. If the Executive Council agree on these four things, the Secretary of State shall be so advised.

No question is raised in this case in regard to the articles being in proper form, nor is it contended that the business is an unlawful one. The Secretary of State informed the appellee that the specific objection made to the articles was in regard to article 4, and said objection was stated by the Secretary of State as follows:

"As to the articles of incorporation of the Federal Oil Company, which you recently submitted to this department, can say I find that article 4 provides in part that the authorized capital stock be \$200,000, of which amount \$195,000 shall be designated as preferred stock and \$5,000 as common stock, each share of the par value of \$10. The preferred stock is to receive a 7 per cent. cumulative dividend, and after the payment of 7 per cent. on the preferred stock the common is to be paid a \$7 yearly cumulative dividend on each \$10 share. Further dividends to be paid on the same basis.



"As previously stated, this department feels that these two classes of stock are entirely too disproportionate, and does not, therefore, feel disposed to approve of the articles in such form. It occurs to me that the average investor regards preferred stock as a first lien on the assets of the corporation, subject only to the claims of creditors, and naturally supposed because of such prior rights that it is nonspeculative and a safe investment. The only security which the preferred stock has in this instance seems to be the amount which they themselves invest, together with whatever may be paid to the corporation for common stock. Should the corporation sell its stock through fiscal agents, it would be required to pay a considerable part of the sale price for commissions. The capital and such securities as there might otherwise be would be impaired from the very beginning."

"After talking this matter over with Mr. Ramsay, it has been decided not to file the articles until changed as to the proportion of common and preferred stock. The ratio, in value, should not exceed one of common to ten of preferred, and must be issued in the same proportion."

In reporting the matter to the Executive Council, the Secretary of State stated:

"Inasmuch as the two classes were so disproportionate, it occurred to me that the preferred stock was preferred in name only, and for this reason, on the ground of public policy, I refuse to file said articles."

The record of the Executive Council was that the council did not approve the articles of incorporation of the Federal Oil Company "as the said articles were contrary to good business practice."

The ultimate and final question for our decision is this: Under our statute where the articles of incorporation are in proper form and where the object is a lawful one, can the Secretary of State or the Executive Council refuse to file the articles and issue the proper certificate? On the one hand, it is contended that the Secretary of State and the Executive Council are purely ministerial officers, whose sole duty is to inspect the articles and ascertain from the articles themselves whether they are in proper form and whether the object is a lawful one, and that if it appears from the articles themselves that they meet these requirements, said officials have no discretion in the matter, and must file the same and issue a certificate therefor. On the other hand, it is the contention of the appellants that the statute has created a tribunal which has been clothed by the Legislature with broad and comprehensive powers, which far exceed the mere examination of the articles and the determination as to their being in proper form, or whether the business to be conducted is lawful. It is contended that under this statute the Legislature has seen fit to clothe the Secretary of State in the first instance with the duty of ascertaining, in addition to other matters, that the object of the corporation is not against public policy, and that on appeal from his decision to that of the Executive Council, the latter tribunal is clothed with the power to "determine," not only

whether the articles are in proper form, of honest purpose, and not against public policy, but also whether they are, in the opinion of said Executive Council, "otherwise objectionable." \* \* \*

No one can dispute the proposition that under the Constitution of the state, the Legislature has the undoubted power to prescribe the terms and conditions under which a corporation shall come into being, and operate within this state. It has passed statutes respecting the manner of organization of certain specified corporations. It has likewise adopted a general incorporation statute. Under such statute the Legislature has designated and prescribed the essential steps which must be taken in order that a corporation may come into being and be clothed with the powers and privileges of a body corporate. The Legislature had the power to and it did require that the articles of incorporation must contain certain specified and essential requisites. Likewise the Legislature had the undoubted authority to require the giving of a notice of incorporation in a certain manner, for a certain length of time, and containing specified particulars. The Legislature also had the power to require that the articles of incorporation shall be filed with and recorded by certain designated officers. ✕ The Legislature also had the power to provide that an officer of the state should ascertain whether or not the articles complied with certain of the requirements designated by statute. ✓

It also must be equally true that the Legislature has the power to provide that a court, a designated officer, or a special tribunal shall pass upon the sufficiency of the articles of incorporation, and also upon their legality, and whether the same are against public policy or are inimical to the welfare of the people of the state. With this plenary power vested in the General Assembly, it cannot, we take it, be successfully maintained that the Legislature could not lawfully create a tribunal clothed with power to legally ascertain and determine whether it is either "against public policy" or "otherwise objectionable" that the state should permit any certain corporation to be organized under the laws of this commonwealth, and receive the sanction and permission of the sovereign power to exist and to operate.

Our inquiry then is, To what extent has the Legislature proceeded under this authority? It has made definite and specific laws for the initial steps in the organization of a corporation under our general incorporation laws. It has provided the essential things that the articles must contain. It has specified how they shall be executed and recorded. It has designated the kind of notice that shall be given. It has stated where the articles of incorporation must be filed and recorded. But it has done far more than this. It has named and designated an officer of the state as one to whom such articles of incorporation must be submitted, and has clothed said officer with the power, authority, and bounden duty of determining certain things respecting said articles. He is not only to pass upon their compliance with the specified requirements respecting legal formalities, but, as we construe the statute, he

is vested with additional powers which the Legislature had the right to confer.\* These powers are something more than ministerial in character. It is more than "a purely ministerial act" for this officer to ascertain and determine whether the object of the corporation is "not against public policy." It is something more than "a purely ministerial act" for this officer to "satisfy" himself that the "plan for doing business is honest and lawful." We know of no good reason why these matters may not be ascertained by other means and from other sources than a mere examination of the articles of incorporation. The statute clothes the Secretary of State by express and definite terms with the authority and the duty to ascertain and "determine" these matters, as well as whether the articles are "in proper form to meet the requirements of the law."

In this connection, it is also to be noticed that the statute expressly provides that should a question of doubt arise as to the legality of the articles, the Secretary of State shall submit them to the Attorney General, whose duty it shall be to forthwith examine and return them with an opinion in writing touching the point or points concerning which an inquiry has been made of him. If such opinion is in favor of the legality of the articles, and no other objections are apparent, they shall then, upon payment of the proper fee, be filed and otherwise dealt with as the law provides. The statute also provides that if the articles are rejected for any other reason than that they have been held by the Attorney General to be illegal, then they may be submitted to the Executive Council. It is very apparent from this provision of the statute that the Legislature intended to provide that questions as to the legality of the articles should be submitted to the Attorney General of the state for his decision. But it is to be noted that the statute expressly provides that, even if the Attorney General decides that the articles are legal, it still remains with the Secretary of State to determine whether "other objections are apparent." The Legislature has therefore provided for much more than the performance of ministerial duties in respect to articles of incorporation. It has provided that the Attorney General shall pass upon the legality of all articles of incorporation that are submitted to him, but "other objections" to the articles are left for the determination of the Secretary of State in the first instance.

That the Legislature intended to make the functions of the Secretary of State something more than "purely ministerial" is also evidenced by the fact that it expressly provided for an appeal from the action of the Secretary of State to a designated tribunal, which the Legislature clothed with specific power to determine the matters involved. This tribunal is the Executive Council of the state, and its duties are set forth in the statute. Can it be successfully claimed that under this designation of powers and duties, the Executive Council are only "ministerial officers" engaged in a "purely ministerial act?"

The statute provides that if the Executive Council sustains the previous action of the Secretary of State, it shall so report in writing. This



statute by its very terms makes the Executive Council an appellate tribunal to review the action of the Secretary of State. If the Secretary of State is merely a ministerial officer, clothed with no discretion whatever in the matter, why provide a tribunal to pass upon and determine the questions involved de novo? \* We think that, by the enactment of this statute, Code Supp. § 1610, the Legislature of this state intended to clothe the Secretary of State with other powers than that of a purely ministerial character. We think that the Legislature intended to and did clothe him with powers to ascertain and determine the very matters and things designated by the statute, to wit, whether the articles of incorporation presented to him are (1) in proper form to meet the requirements of the law; (2) that their object is lawful; (3) that their object is not against public policy; and (4) that the plan of doing business provided for is honest and lawful. In so doing, his powers are other and broader than those generally recognized as "purely ministerial." From his decision, an appeal lies to a tribunal designated by the Legislature, and its powers are likewise more than ministerial.

\* \* \*

We think that the Legislature of this state has evidenced a definite policy in regard to the organization of corporations and the sale of corporate stock. As a part of that policy it has provided that the state by its proper officers shall investigate the "plan of doing business," and shall ascertain whether any corporation is not only unlawful, but "against public policy" or "otherwise objectionable," before it shall be clothed with authority from the state to transact business. The Legislature had the right to confer these powers, duties, and authority upon these officials, and it has seen fit so to do.

While it may be that this legislation confers broader and more comprehensive powers than are usually conferred on similar officers respecting the approval of articles of incorporation, we do not find it to be inconsistent with the policy of the state in this regard, nor in contravention of our Constitution. We are of the opinion that the powers, duties and authority conferred upon the Secretary of State and the Executive Council by the statute in question involve the exercise by said officials of discretion and judgment, and are more than ministerial, and we so hold. ✓

II. It is contended by appellants that the action of the Executive Council is final, and cannot be reviewed by the courts. No provision is made in the statute for any appeal from the action of the Executive Council. Under the provisions of our statute, however, a writ of certiorari can issue to review the action of the Executive Council within the limits of the functions of such a writ. Our statute (Code, § 4154) provides:

*"When Writ may Issue.* The writ of certiorari may be granted when authorized by law, and in all cases where an inferior tribunal board or officer exercising judicial functions is alleged to have exceeded his prop-

er jurisdiction, or is otherwise acting illegally, and there is no other plain, speedy and adequate remedy."

This was the remedy resorted to in the instant case in the trial court. It is unnecessary for us to discuss at this time the proper functions of this writ, or the extent of judicial authority thereunder. We confine our holding to the proposition that application for a writ of certiorari was a proper proceeding in the instant case. This suit calls in question the decision of the Executive Council in sustaining the action of the Secretary of State in refusing to file the articles of incorporation presented by appellee. We fail to find that the said Executive Council has exceeded its proper jurisdiction, or otherwise acted illegally in said matter.

It follows that the decree of the trial court was erroneous, and the same must be, and is, reversed.

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ILLINOIS STATE BOARD OF DENTAL EXAMINERS v.  
PEOPLE ex rel. COOPER.

Supreme Court of Illinois, 1887. 123 Ill. 227, 13 N. E. 201.

Appeal from appellate court, First district; L. C. Collins, Judge.

MAGRUDER, J. This is a petition for mandamus, in which the relator prays that the Illinois state board of dental examiners may be commanded to issue to him a license to practice dentistry and dental surgery in the state of Illinois.

The statute under which the petition is filed, and which defines the powers and prescribes the duties of the state board of dental examiners, is "An act to secure the better education of practitioners of dental surgery, and to regulate the practice of dentistry in the state of Illinois," approved May 30, 1881, in force July 1, 1881. Hurd's Rev. St. 1885, c. 91, p. 816. The sixth section of this act is as follows: "Any and all persons who shall so desire, may appear before said board at any of its regular meetings, and be examined with reference to their knowledge and skill in dental surgery; and, if the examination of any such person or persons shall prove satisfactory to said board, the board of examiners shall issue to such persons as they shall find from such examination to possess the requisite qualifications a license to practice dentistry in accordance with the provisions of this act. But said board shall, at all times, issue a license to any regular graduate of any reputable dental college without examination, upon the payment, by such graduate, to the said board, of a fee of one dollar. All licenses issued by said board shall be signed by the members thereof, and be attested by its president and secretary; and such license shall be prima facie evidence of the right of the holder to practice dentistry in the state of Illinois." The first section of the act provides "that it shall be unlawful for any person who is not at the time of the passage of this act engaged in the practice of dentistry in this state, to com-

mence such practice, unless such person shall have received a diploma from the faculty of some reputable dental college duly authorized by the laws of this state, or of some other of the United States, or by the laws of some foreign country, in which college or colleges there was, at the time of the issue of such diploma, annually delivered a full course of lectures and instruction in dental surgery," etc. In *People v. Dental Examiners*, 110 Ill. 180, we held that the act did not specifically define what was a reputable college, and that it was left to the discretion and judgment of the board to determine what was a reputable college. In that case the mandamus was refused on the general ground that the writ will not lie to compel the performance of acts or duties which necessarily call for the exercise of judgment and discretion on the part of the officer or body at whose hands their performance is required.

But if a discretionary power is exercised with manifest injustice, the courts are not precluded from commanding its due exercise. They will interfere, where it is clearly shown that the discretion is abused. Such abuse of discretion will be controlled by mandamus. A public officer or inferior tribunal may be guilty of so gross an abuse of discretion, or such an evasion of positive duty as to amount to a virtual refusal to perform the duty enjoined, or to act at all in contemplation of law. In such a case mandamus will afford a remedy. *Tap. Mand.* 19, 66; *Wood, Mand.* 64; *Lynah v. Commissioners*, 2 *McCord* (S. C.) 170; *People v. Perry*, 13 *Barb.* (N. Y.) 206; *Arberry v. Beavers*, 6 *Tex.* 457, 55 *Am. Dec.* 791.

In *Village of Glencoe v. People*, 78 Ill. 382, we said: "The discretion vested in the council cannot be exercised arbitrarily, for the gratification of feelings of malevolence, or for the attainment of merely personal and selfish ends. It must be exercised for the public good, and should be controlled by judgment, and not by passion or prejudice. When a discretion is abused, and made to work injustice, it is admissible that it shall be controlled by mandamus."

In the present case the demurrer admits all the allegations of the petition to be true. It will be necessary to examine those allegations to see if they show any abuse of discretion on the part of the board, or any unjust exercise of the discretionary power vested in it.

The petition alleges that the relator complied with the requirements of the statute, and with the rule of the board adopted in September, 1884. That rule is as follows: "Resolved, that after June, 1885, the Illinois state board of dental examiners will recognize as reputable only such dental colleges as require, as a requisite for graduation, attendance upon two full, regular courses of lectures and practical instruction, which courses shall each be of not less than five months' duration, and shall be held in separate years, with practical instruction intervening between the courses. Such colleges must also require a preliminary examination before admitting students to matriculation, provided that no certificate from a high or normal school, or other literary institution, is presented by the candidate."



On November 4, 1884, the relator matriculated as a student in the Chicago College of Dental Surgery, with which four of the five members of the appellant board are alleged to be connected as instructors or members of the faculty, and pursued his studies there during a period of not less than five months in 1884 and 1885. During the summer and fall of 1885 he received practical instruction in dentistry and dental surgery. On November 2, 1885, he matriculated as a student in the Northwestern College of Dental Surgery, which gives such lectures and instructions as are required by the above rule, and attended therein as a student during one course of instruction of not less than five months in the years 1885 and 1886. A diploma was issued to him by the last-named college on April 3, 1886. On May 11, 1886, he presented this diploma to the state board of dental examiners at a regular meeting thereof, and tendered his fee of one dollar, and demanded a license. The board has refused to issue the license.

The petition avers that the board so refused to give him a license through malice, because he left the Chicago College, in which four members of the board are interested, and graduated at the Northwestern College. It also avers that the two colleges are rivals for the patronage of students; that the board is under the control of the Chicago College, and determined to break down the Northwestern College; and that the refusal to issue the license springs from a determination to protect their own college from competition.

If these averments are true, the members of the state board are abusing their discretion, and making an unjust use of it. They have a right to decide whether the college at which an applicant for license has graduated is reputable or not. But they must decide that question upon just and fair principles. The discretion with which they are vested was conferred upon them in the interests of the public, and to protect the people from unskillful and uneducated practitioners of dentistry. If four of the five members which compose the board are instructors in a particular college, and if they are making use of their power under the state law to build up their own institution, and crush out its rival, they are acting from motives of self-interest, and not in the interests of the public. It cannot be tolerated that licenses should be withheld for any such unworthy reasons. Inasmuch as the board has elected to stand by the overruled demurrer to the petition, we are bound to assume that the statements of the petition are true.

Again, the relator says in his petition that after his application on May 11, 1886, he wrote on May 25th to the secretary of the board and inquired why a license was not issued to him. On May 26th the secretary wrote in reply, returning the one dollar, and saying: "The matter of issuing a license on your diploma from the Northwestern College of Dental Surgery was referred to the national association of dental examiners, which will meet in August. Until their decision, I cannot issue any license." It appears that the association here referred to is composed, for the most part, of men liv-

ing outside of this state, and that its meeting "in August" was to take place in the state of New York.

When a regular graduate of a dental college applies to the board of examiners for a license, the only question for them to determine is whether the college at which the applicant graduated is reputable or not. The law clothes them, and no other body, with the power to decide this question. They cannot delegate their discretionary power to an organization beyond the limits of the state. By the letter of the secretary the board declined to perform the duty imposed upon it by the Illinois statute, and announced its intention of referring the question of issuing a license to a foreign association.

After this announcement, upon being threatened with a mandamus proceeding, the board, in an official communication, signed by its secretary, promised the relator's attorney that, if he would wait a reasonable time, it would call a meeting, and would issue to the relator the license which he demanded. The meeting was held on June 25, 1886, but the license was refused. <sup>x</sup> When the board promised to issue a license, it must have been of the opinion that the relator was entitled to it, and they could not have considered him entitled to it unless they regarded the college at which he had graduated as reputable.

It is claimed by counsel for appellee that the board, by adopting the above rule, has exercised its discretion in determining what is a reputable dental college; that any college, which insists upon such requisites for graduation as the rule prescribes, must be recognized by the board as a reputable college; and that as the Northwestern College has brought itself within the requirements of the rule, the board has no discretion about admitting its graduates. On the other hand, counsel for appellant insists that while no colleges which fail to comply with the rule will be regarded as reputable, yet the board would have a right to demand other requisites than those specified in the rule before deciding a college to be reputable.

We are not prepared to hold that a dental college which requires a preliminary examination before admitting students to matriculation, and which requires students before graduation to attend upon two full regular courses of lectures and practical instructions, each to be of not less than five months' duration, and to be held in separate years, with practical instructions intervening between the courses, may not in other respects lack some of the elements which make such an institution reputable. "Reputable," according to Webster's definition, means "worthy of repute or distinction;" "held in esteem;" "honorable;" "praiseworthy." A college might have examinations and lectures and instructions of such an inferior character, and under the direction of such inferior instructors, that it would be unworthy of praise and undeserving of esteem.

But the petition in this case alleges that the Northwestern College has been recognized by the board of examiners as a reputable dental college, and was so recognized when the relator presented his diploma.

(As the board did not refuse to grant the license on the ground that the Northwestern College was not reputable, but refused such license on other grounds, as stated in the petition, it will be presumed that the members regarded that college as reputable. They had no discretion as to any other matter than the character of the college issuing the diploma, as to its being reputable or not reputable. When that matter was decided and out of the way, their judicial or discretionary power was exhausted. The duty to issue the license was then a mere ministerial one, and its performance could be enforced by mandamus.

We think that the allegations of the petition, considered as a whole, warranted the issuance of the writ of mandamus.

The judgment of the appellate court is affirmed.<sup>6</sup>

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DODD et al. v. FRANCISCO et al.

Supreme Court of New Jersey, 1902. 68 N. J. Law, 490, 53 Atl. 219.

Certiorari to review proceedings of state board of health in reversing action of local authorities, and granting permission to locate a cemetery in the town of Bloomfield.

<sup>7</sup>DIXON, J. \* \* \* There remains only the fourth reason assigned for reversal—that the board based its conclusion on sanitary grounds alone.

If this reason were supported by proper proof we would be inclined to deem it fatal to the resolution under review. While the statute, by requiring the concurrence of the municipal council and the local board of health in the first instance, seems fairly to imply a division of function between them, so that the board of health may pass upon sanitary questions only, and the municipal council<sup>8</sup> upon the other questions pertinent to the matter in hand, it seems likewise, by confiding to the state board of health the power of affirming or reversing the action of either or both of these local bodies, to imply that all pertinent questions are open for consideration by the state board.

But we think the reason is not properly supported. What appears is that one or perhaps more than one member thought that only sanitary considerations should have weight; but it is at least doubtful whether the board, then composed of eight members, adopted this view. As already stated, every suggestion which anybody desired to present was entertained by the board, and we think the board is entitled to the presumption that every suggestion had its due influence. That presumption should stand until the board itself certifies to the contrary, or until, a rule to obtain a certificate from the board proving ineffec-

<sup>6</sup> Accord: State ex rel. Johnston v. Lutz, 136 Mo. 633, 38 S. W. 323 (1896).

<sup>7</sup> For other part of opinion, see post, p. 203.



tual, clear proof to the contrary is produced aliunde. See *Newark v. North Jersey Street Railway Co.*, 68 N. J. Law, 486, 53 Atl. 219.

We find no error, and the resolution of May 22, 1902, is affirmed, with costs.

### CITY OF LONDON CORPORATION v. WOLF.

King's Bench Division. [1916] 80 J. P. Rep. 453.

This is an appeal by the corporation of the City of London from a decision of an alderman of the city, who was the proper authority to decide an appeal from the county purposes committee of the corporation under the London County Council (General Powers) Act, 1910. Incidentally that act conferred the jurisdiction to grant licenses to persons desiring to carry on employment agencies. The statute was passed with the object of preventing fraud and immorality by making it necessary that persons carrying on employment agencies should be licensed and consequently under proper control. In this case the matter is very simple. The respondent desired a license to carry on a charitable institution with the object of obtaining situations for naturalized subjects of German, Austrian, or Hungarian birth, who might be out of employment on account of the war. There is not the faintest ground for any suggestion against the respondent's character and loyalty. He is a person of German birth who became a naturalized British subject in 1889. Neither in the case stated nor during the argument has any suggestion been made against him. But on the application by him to the general purposes committee, it was objected that it was not desirable that the respondent should be licensed because, although naturalized and loyal, he was a person of enemy origin, and the object of the agency was to find employment for persons of enemy origin and consequently he was not a suitable person to whom to grant the license. It was pointed out to the committee that the respondent was the honorary secretary of the institution and that he would be acting under the directions of a council which had been formed for that purpose. The committee came to the conclusion that the respondent was not a suitable person within the meaning of section 22 (1) of the act, under which there is an obligation on the licensing authority to grant the license, provided that they may refuse to grant it upon the ground that the applicant is an unsuitable person to hold it.

The question of suitability is a question of degree. In peace time it would not be suggested that the respondent is an unsuitable person but in time of war his suitability may properly be considered by the licensing authority, having regard to the scope and object of the employment agency and to the persons whom it was intended to benefit. The licensing authority may take into account the fact that the applicant for the license is of German origin and ought not to have the license granted to him, in other words, that in these times he is not a

suitable person to hold the license. On appeal the alderman, having considered the various contentions, overruled the contentions of the corporation, as he felt bound by the provisions of the British Nationality and Status of Aliens Act, 1914, and nothing having been suggested against the personal character or loyalty of the respondent, and there being no evidence that the agency was likely to lead to public mischief or danger, the alderman held that the respondent was not an unsuitable person to hold the license. The result was that the alderman differed from the committee, which had refused the license, and he granted it. If, bearing in mind the facts of the case, and taking into consideration the character of the respondent and the views put forward with regard to him, the alderman had come to the conclusion that although the respondent was of German origin there could be no ground for saying that any public mischief or danger would be caused by granting him the license, I entertain no doubt that there would be no jurisdiction in this court to interfere with the alderman's decision, and he would have been justified in coming to that conclusion.

But I cannot so read the case, which shows that he felt bound by the British Nationality and Status of Aliens Act, 1914, to throw out of consideration the fact that the respondent was of German birth. I cannot think that that is right. The act entitles a naturalized British subject to all political and other rights, powers, and privileges to which a natural-born British subject is entitled. But I treat this case as on the same footing as if the application for a license had been made by a natural-born British subject with German associations. In war time the circumstance of association with persons of an enemy country may properly be taken into account in matters of discretion of this kind, where the licensing authority has to determine whether the applicant is a suitable person to be licensed in respect of a particular employment agency. I should come to exactly the same conclusion if the application had been made by a natural-born British subject. The fact that the respondent is a naturalized subject of enemy origin does not necessarily preclude him from being a suitable person. But that fact must not be excluded from consideration by the licensing authority. It might be very material. There might be evidence before them that public mischief or danger would ensue if the applicant was licensed. The fact that the applicant was of enemy origin might properly affect their minds. But here the alderman has held that the statute of 1914 shuts the door on any such consideration, and it is solely on that ground that I decide that the alderman was wrong. The act of 1914 has nothing to do with this case. What the alderman has to consider is whether in the circumstances and in view of the state of public feeling by reason of unjustifiable and it may be of cruel and barbarous acts on the part of the enemy the respondent is a suitable person to hold the license.



The case must go back to the alderman in order that he may exercise his judgment on it as a whole, bearing in mind that the act of 1914

does not shut out consideration of the fact that the respondent is of enemy origin.

RIDLEY, J., concurs.

LOW, J. It is clear that the alderman came to the conclusion that the British Nationality and Status of Aliens Act, 1914, prevented him from considering the propriety of granting the license to a person of enemy origin. It is sufficient to say that that act does not so limit the alderman's discretion. The case must go back for his reconsideration, and in doing so he ought, in the circumstances in which we now find ourselves, indeed, I think he is bound, to take into consideration the fact of the respondent's origin. When he has considered that fact, the question whether the license should be granted is entirely for him.

Appeal allowed and case remitted.

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### In re SPARROW.

Supreme Court of Pennsylvania, 1890. 138 Pa. 116, 20 Atl. 711.

PAXSON, C. J. This was a writ of alternative mandamus directed to Hon. S. S. Mehard, president judge of the court of quarter sessions of Mercer county, requiring him to show cause why he should not grant a license to sell liquor at retail to George L. Sparrow, the petitioner. To the alternative writ, the learned judge makes a very full return, setting forth, *inter alia*:

(a) "That the said applicant is a citizen of the United States, and of this commonwealth, of temperate habits, and of good moral character."

(b) "That the National Hotel, for which said license was prayed, was then and still is a good hotel, and necessary for the accommodation of the public and the entertainment of strangers and travelers."

(c) "That the borough of Greenville, where the said hotel is located, has a population of nearly 4,000 persons, and there was then and is now no licensed house in said borough, or within 12 miles of it."

(d) "That remonstrances were filed against said application wherein it was alleged that said license was not a matter of public necessity; that said license was not necessary for the accommodation of the public, and the entertainment of strangers and travelers; and that the granting of said license would be detrimental to the public good, and an injury instead of a benefit to that community."

(e) "That these remonstrances were signed by 870 citizens of said borough of Greenville, of whom 217 were males, and 653 were females, and all of whom were above the age of 21 years."

(f) "That additional petitions, asking that said license be granted, were likewise filed, wherein it was alleged that such license was necessary for the accommodation of the public, and the entertainment of strangers and travelers; and that the applicant was a fit person to



whom to grant such license. That said additional petitions were signed by 592 citizens of said borough, of whom 471 were males and 121 females, all of whom were above the age of 21 years."

(g) "That thereupon your respondent, representing the court of quarter sessions of the peace, in and for the county of Mercer, having due regard to the number and character of the petitioners for and against said application, considered that the clear preponderance was in favor of the remonstrants and against the petitioners; and therefore, determining that the license prayed for was not necessary for the accommodation of the public and entertainment of strangers or travelers, refused to grant the same."

(h) "The respondent respectfully states that he is of opinion that, notwithstanding all the facts favorable to complainant's application above set forth, the preponderance of the remonstrants against, over the petitioners for, said license, was of itself a sufficient ground for concluding that the same was not a matter of public necessity, and therefore a just and lawful ground for refusing to grant it; and that this opinion is based upon our acts of assembly as interpreted by your honorable court."

It would have been sufficient for the learned judge below to have returned that he had considered the petitions and the remonstrances, and that, in the exercise of his discretion, he had refused the license. His return is very full, however, and he has placed upon the record all the facts bearing upon this application. It presents a case differing in many respects from any we have had before us, and we may assume that he made such return in order to enable us to apply the law to the peculiar facts of the case.

We have decided repeatedly, in language too plain to be misunderstood, that the granting of a license to sell liquor by retail rests in the sound discretion of the court below. In Reed's Appeal, 114 Pa. 452, 6 Atl. 910, we said: "The action of the court in granting the license complained of is something that we cannot review, that being a matter of discretion, though we are satisfied that there was a misapprehension of the act of 22d March, 1867." In the late case of *In re Raudenbusch*, 120 Pa. 328, 14 Atl. 148, in alluding to this discretion, we said: "It has been exercised by that court [quarter sessions] time out of mind, and the power has again and again been affirmed by this court. This discretion, however, is a legal discretion, to be exercised wisely, and not arbitrarily. A judge who refuses all applications for license, unless for cause shown, errs as widely as the judge who grants all applications. In either case, it is not the exercise of judicial discretion, but of arbitrary power. The law of the land has decided that licenses shall be granted to some extent, and has imposed the duty upon the court of ascertaining the instances in which the license shall be granted. In order to perform this duty properly, the act of assembly has provided means by which the conscience of the court may be informed as to the facts. It may hear petitions, remonstrances, or witnesses, and we have no doubt the court may, in some instances, act of its own

knowledge." In *Schlaudecker v. Marshall*, 72 Pa. 200, Mr. Justice Agnew, in referring to the same subject, said: "Whether any or all licenses should be granted, is a legislative, not a judicial, question. Courts sit to administer the law fairly, as it is given to them, and not to make or repeal it. The law of the land has determined that licenses shall exist, and has imposed upon the court the duty of ascertaining the proper instances in which the license shall be granted, and therefore has given it to the court to decide upon each case as it arises in due course of law. The act of deciding is judicial, and not arbitrary or willful. The discretion vested in the court is, therefore, a sound judicial discretion; and, to be a rightful judgment, it must be exercised in the particular case, and upon the facts and circumstances, before the court, and after they have been heard and duly considered—in other words, to be exercised upon the merits of each case, according to the rule given by the act of assembly. To say that I will grant no license to any one, or that I will grant it to every one, is not to decide judicially on the merits of the case, but to determine beforehand without a hearing or else to disregard what has been heard. It is to be determined not according to law, but outside of law, and it is not a legal judgment, but the exercise of an arbitrary will."

I have given these copious extracts from the opinions of this court to emphasize the fact that the law not only gives to the judges of the court of quarter sessions the discretion of granting or refusing licenses, but also requires such discretion to be exercised in a sound judicial manner, and also casts upon them the responsibility. That responsibility they cannot evade by throwing it upon the remonstrants or upon this court. To refuse a license, because, in the mind of the judge, there is a belief that licenses should not be granted at all, as a matter of policy, is to make law, not to administer it. The judge to whom an application is made may inform his conscience in the manner before pointed out. He may hear remonstrances, and it is his duty to give them due weight, but, after all, the responsibility rests with him, and he must exercise his own judgment and discretion in the light which such aids have furnished. In the case in hand, there appears to have been an unusual effort, both for and against the application. The number of remonstrants considerably exceeds that of the petitioners. This is all very well so far as it is addressed to the discretion of the court. The result is not conclusive upon him. Otherwise, we would have local option without the sanction of an act of assembly, yet enforced by the judiciary. In the case in hand, the learned judge has undoubtedly attached great weight to the remonstrances. He does not appear, however, to have wholly substituted the judgment of the remonstrants for his own. The most that can be said is that they were of sufficient weight to convince him that the license was not a matter of public necessity. In the view we take of the case, this was not an abuse of discretion. We are not called upon to say whether it was exercised wisely.

Mandamus refused.

## ELLIS v. DUBOWSKI.

King's Bench Division. [1921] 3 K. B. 621.

Case stated by Justices for the Brentford Division in the County of Middlesex.

An information was laid by the appellant, who was an inspector under the Middlesex County Council, charging the respondents, as occupiers of the Gaiety Cinema, Twickenham, with having unlawfully allowed the premises to be used in contravention of one of the conditions subject to which the license relating to the premises was granted under the Cinematograph Act, 1909. At the hearing of the information it was proved that the license was granted subject (inter alia) to the following condition: "That no film be shown which is likely to be injurious to morality or to encourage or incite to crime, or to lead to disorder, or be in any way offensive in the circumstances to public feeling or which contains any offensive representations of living persons, or which has not been certified for public exhibition by the British Board of Film Censors. If the Licensing Committee serve a notice on the licensees that they object to the exhibition of any film on any of the grounds aforesaid that film shall not be shown."

LAWRENCE, C. J. In this case the justices refused to convict, because in their view the condition imposed was a condition upon breach of which notice must be served on the licensee by the licensing committee in each case before a conviction could be obtained against him. I do not think that that view is correct, but the conclusion to which the justices came is to be reached upon another ground, namely, as submitted to us by Mr. Giveen, that the requirement under that condition that a film should be certified by the British Board of Film Censors before it can be shown is bad and ultra vires the licensing committee. The condition sets up an authority whose ipse dixit is to control the exhibition of films. The effect is to transfer a power which belongs to the County Council and can be delegated to committees of the Council or to district councils or to justices sitting in petty sessions alone. I think that such a condition is unreasonable, and that the committee had no power to impose it. The first five branches of this condition are quite proper; then follows the sixth, as to the film being certified by the British Board of Film Censors, which is, in my opinion, bad.

I am prepared to assume that the powers of the Board are exercised wisely and discreetly. But the committee have no power to create an absolute body from which no right of appeal exists. If, as was suggested by Sankey, J., in the course of the argument, the condition had reserved to the committee the right to review the decisions of the Board, it would seem to be a reasonable condition. Upon that Mr. Giveen's answer did not convince me; for it is reasonable that no film should be shown which has not been passed by some body. But that body should not be made the final dictator, and a condition putting



the matter into the hands of a third person or body not possessed of statutory or constitutional authority is *ultra vires* the committee. The committee are a responsible body, as also are the justices in petty sessions, both being recognized as such by statute; the British Board of Film Censors have no such authority. For these reasons it appears to me that the condition is invalid and that the appeal must be dismissed.

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UNITED STATES et al. v. NEW YORK CENT. R. CO. et al.

Supreme Court of the United States, 1924. 263 U. S. 603, 44 S. Ct. 212, 68 L. Ed. 470.

Appeal from the District Court of the United States for the District of Massachusetts.

Suit by the New York Central Railroad Company and others against the United States and others. Permanent injunction was granted (288 F. 951), and defendants appeal. Affirmed.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by railroad companies to prevent the enforcement of an order of the Interstate Commerce Commission dated March 6, 1923, following reports of January 26 and March 6, 1923. 77 Interst. Com. Com. Rep. 200, 647. The order purports to be made in pursuance of the Act of August 18, 1922, c. 280; 42 Stat. 827 (Comp. St. Ann. Supp. 1923, § 8595). This Act amended section 22 of the Interstate Commerce Act by adding to what became (1) two paragraphs, viz.: (2) Directing the Commission to require the railroads subject to the Act, with such exemptions as the Commission holds justified, to issue interchangeable mileage scrip coupon tickets at just and reasonable rates, in such denominations as the Commission may prescribe, with regulations as to use and prescribing whether the tickets are transferable or not transferable and if the latter what identification may be required, and what baggage privileges go with such tickets; (3) making it a misdemeanor for any carrier to refuse to issue or accept such ticket as required or to conform to the Commission's rules, or for any person willfully to offer for sale or carriage any such tickets contrary to such rules. After a hearing the Commission ordered the railroads specified, being all the railroads having annual operating revenues in excess of \$1,000,000 and known as Class 1, to issue, at designated offices, a non-transferable interchangeable scrip coupon ticket in the denomination of \$90, which shall be sold at a reduction of 20 per cent. from the face value of the ticket.

The bill alleges that the amendment of 1922 as construed by the Commission is contrary to the Fifth Amendment and to the commerce clause, article 1, section 8, of the Constitution, but that properly construed it does not authorize the order made. The order is alleged to apply to intrastate carriage and also to be inconsistent with section 2 of the Interstate Commerce Act (Comp. St. Ann. Supp. 1923, § 8564).

which requires like charges for like service in similar circumstances; with section 3 (Comp. St. Ann. Supp. 1923, § 8565) forbidding unreasonable preferences; with section 15a (Comp. St. Ann. Supp. 1923, § 8583a) providing for the establishing of rates for rate groups that will earn a fair return upon the aggregate value of the property used in transportation (see *Increased Rates*, 1920, cited as *Ex parte* 74, 58 Interst. Com. Com. Rep. 250; *Reduced Rates*, 1922, 68 Interst. Com. Com. Rep. 676); and with sections 1 and 22 (Comp. St. Ann. Supp. 1923, §§ 8563, 8595) requiring the Commission to establish just and reasonable fares. These averments are developed in detail, but we do not dwell upon them because the decision below and our own turn upon a different point. It is further alleged in the bill that the conclusion stated by the Commission that the reduced rates established by it for scrip coupon tickets will be just and reasonable for that class of travel is contrary to the specific facts found by the Commission, and is not to be taken as an independent finding of fact, but only as a conclusion or ruling reached by it upon a misinterpretation of the law. This was the view taken by the three judges who sat in the District Court. They held that the Commission considered that the amendment of 1922 either required it to make a reduction or at least showed a spirit and purpose that should be deferred to, and on that ground came to a result that otherwise would not have been reached. They held that therefore the order could not stand, considering that the amendment of 1922 like the rest of the Interstate Commerce Act called for an unbiased opinion upon the merits of the case. They issued a perpetual injunction and the defendants appealed. 288 F. 951.

We are of opinion that the interpretation of the statute in the court below was right. There is no doubt that the bill owed its origin to a movement on the part of traveling salesmen and others to obtain interchangeable mileage or scrip coupon books at reduced rates. The bill that was passed originally fixed reduced rates, but it was amended to its present form undoubtedly because the prevailing opinion was that the rates should be determined in the usual way by the usual body. The object of the traveling salesmen was defeated in so far as Congress declined to take any step beyond authorizing the issue of scrip tickets. Coming as it did from the agitation for this form of reduced fares, the statute naturally enough carried with it more or less mirage of fulfilling the hope that gave it rise, but in fact it required a determination of what was just and reasonable exactly as in any other case arising under the Interstate Commerce Act. The original purpose of the amendment as introduced retained headway enough to require the issue of scrip, but there the purpose was stopped, and, as not infrequently happens in legislation, the matter was left otherwise where it was before. Apart from constitutional difficulties, *Lake Shore & Michigan Southern Ry. Co. v. Smith*, 173 U. S. 684, 19 S. Ct. 565, 43 L. Ed. 858, the whole tendency of the law has been adverse to the enactment as proposed at least unless a clear case should be made out.

The Commission in its report pointed out that the net railway operating income for the seven months ending July 31, 1922, was below the return fixed as reasonable, discarded the supposed analogy between the carload rate and the interchangeable scrip or mileage ticket, intimated that the supposed benefit that the carrier might get from the advance use of the money would be more than offset by the increased expenses, and said that the question whether the scrip ticket would stimulate travel sufficiently to meet any loss that might result must remain a matter of speculation until an experiment was made. After thus excluding the grounds upon which the order could be justified the Commission held that the obvious spirit and apparent purpose of the law required that the experiment should be tried, and on these premises declared that the rates resulting from the reduction of 20 per cent. would be "just and reasonable for this class of travel." It seems to us plain that the Commission was not prepared to make its order on independent grounds apart from the deference naturally paid to the supposed wishes of Congress. But we think that it erred in reading the wishes that originated the statute as an effective term of the statute that was passed, and therefore that the present order cannot stand.

Decree affirmed.<sup>8</sup>

<sup>8</sup> As to discretion in the matter of certificates of convenience and necessity, see article by D. E. Lilienthal and I. S. Rosenbaum on motor carrier legislation, 36 Yale Law J. 163, at page 180 (Considerations for Commissions in the Issuance of Certificates), and same authors in 22 Ill. Law Rev. 47, 59.



### CHAPTER 3

### NOTICE AND HEARING

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### SECTION 8.—REVENUE

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#### HAGAR v. RECLAMATION DIST. NO. 108.

Supreme Court of United States, 1884. 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569.

Appeals from the United States Circuit Court for the District of California.

FIELD, J. By an act of the Legislature of California, passed in 1868, a general system was established for reclaiming swamp and overflowed salt marsh and tide lands in the state, of which there is a large quantity, and thus fitting them for cultivation. It will be sufficient for the purposes of this suit to state the general features of the system without going much into detail. It provides for the formation of reclamation districts where lands of the kind stated are susceptible of one mode of reclamation; such districts to be established by the board of supervisors of the county in which the lands, or the greater part of them, are situated, upon the petition of one-half or more of the holders thereof. The petition being granted, the petitioners are required to establish such by-laws as they may deem necessary for the work of reclamation, and to keep the same in repair; and to elect three of their number to act as a board of trustees to manage the same. This board is empowered to employ engineers and others to survey, plan, and estimate the cost of the work, and of land needed for right of way, including drains, canals, sluices, watergates, embankments, and material for construction; and to construct, maintain, and keep in repair all works necessary for the object in view. The trustees are required to report to the board of supervisors of the county, or, if the district be in more than one county, to the board of supervisors in each county, the plans of the work and estimates of the cost, together with estimates of the incidental expenses of superintendence and repairs. The supervisors are then to appoint three commissioners, who are jointly to view and assess upon each acre to be reclaimed or benefited a tax proportionate to the whole expense, and to the benefits which will result from the works; which tax is to be collected and paid into the county treasury or treasuries, as the case may be, and placed to the credit of the district, to be paid out for the work of reclamation, upon the order of the trustees, when approved by the board of supervisors of the county. If the district be in more than one county, the tax is to be paid into the treasury of the county in which the land assessed is situated. If

the original assessment be insufficient for the complete reclamation of the lands, or if further assessments be required for the protection, maintenance, and repair of the works, the supervisors may order additional assessments upon presentation by the trustees of a statement of the work to be done, and an estimate of its cost, such assessments to be levied, and, if delinquent, collected in the same manner as the original assessment. The commissioners are required to make a list of the amounts due from each owner of land in the district, and of the amount assessed against the unsold land, and file the same with the treasurer of the county in which the lands are situated. The lists thus prepared are to remain in the office of the treasurer for 30 days or longer, if so ordered by the trustees, during which time any person can pay to the treasurer the amount assessed against his land; but if, at the end of the 30 days, or the extended time, the tax has not been paid, the treasurer is to transmit the list to the district attorney, who is to proceed at once against the delinquents in the manner provided by law for the collection of state and county taxes.

The Political Code of the state, which went into effect on the 1st of January, 1873, embraces substantially the provisions of the act of 1868. The changes are more in language than in substance. So far as subsequent proceedings are concerned, the Code prescribes the rule. The reclamation district No. 108, the plaintiff in the court below, was established in September, 1870, under the act of 1868. It embraces over 74,000 acres of land, situated in the counties of Yolo and Colusa, and forming a compact body susceptible of one mode of reclamation. The trustees of the district originally estimated the cost of the reclamation works, including incidental expenses, at \$140,000, and the commissioners appointed assessed that sum upon the lands in the district. The amount proved to be insufficient to complete the works, and, upon the report of the trustees that the further sum of \$192,000 was required for that purpose, the supervisors ordered that amount to be assessed, and the commissioners appointed by them levied the assessment upon the lands. This assessment became delinquent, and the present suits were brought to obtain a decree that the several amounts charged upon the lands of the appellant are liens upon them, and for their sale to satisfy the charges. One of the suits is to enforce the lien on the lands in Yolo county, and the other the liens on the lands in Colusa county. On his motion they were both removed to the circuit court of the United States. That court held in each case that the several sums assessed were valid liens upon the lands of the appellant on which they were levied, and ordered that the lands be sold for the payment of the amounts, with interest and costs. From these decrees the appeals are taken. \* \* \*

The appellant contends that this fundamental principle<sup>1</sup> was violated

<sup>1</sup> I. e., that there can be no proceeding against life, liberty, or property, which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights.

in the assessment of his property, inasmuch as it was made without notice to him, or without his being afforded any opportunity to be heard respecting it; the law authorizing it containing no provision for such notice or hearing. His contention is that notice and opportunity to be heard are essential to render any proceeding due process of law which may lead to the deprivation of life, liberty, or property. Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley, in his concurring opinion in *Davidson v. New Orleans* [96 U. S. 97, 24 L. Ed. 616]: "In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

The power of taxation possessed by the state may be exercised upon any subject within its jurisdiction, and to any extent not prohibited by the Constitution of the United States. As said by this court: "It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal Constitution, the power of the state, as to the mode, form, and extent of taxation, is unlimited where the subjects to which it applies are within her jurisdiction." *State Tax on Foreign-Held Bonds*, 15 Wall. 319, 21 L. Ed. 179.

Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and, generally, specific taxes on things or persons or occupations. In such cases the Legislature in authorizing the tax fixes its amount, and that is the end of the matter. If the tax be not paid the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due proc-



ess of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is therefore invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person with a license to do business of a particular kind, or at a particular place, such as keeping a hotel or a restaurant, or selling liquors or cigars or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the state, or on domestic corporations for franchises, if the parties desire the privilege they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it.

But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially, and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments. The law, in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law.<sup>2</sup>

In some states, instead of a board of revision or equalization, the assessment may be revised by proceedings in the courts and be there corrected if erroneous, or set aside if invalid; or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment which can be deemed essential to render the proceedings due process of law.

In *Davidson v. New Orleans*, this court decided this precise point. In that case an assessment levied on certain real property in New Orleans for draining the swamps of that city was resisted on the ground that the proceeding deprived the owners of their property without due process of law, but the court refused to interfere, for the reason that

<sup>2</sup> That the duties of assessors in estimating the value of property for purposes of general taxation are judicial, see *Barhyte v. Shepherd*, 35 N. Y. 238, 250 (1866); *Hassan v. Rochester*, 67 N. Y. 528, 536 (1876); *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289 (1878); *Williams v. Weaver*, 75 N. Y. 30, 33 (1878); *Cooley, Tax'n*, 266; *Burroughs, Tax'n*, § 102; *Jordan v. Hyatt*, 3 Barb. (N. Y.) 275, 283 (1848); *Ireland v. Rochester*, 51 Barb. (N. Y.) 416, 430, 431 (1868); *State v. Jersey City*, 24 N. J. Law, 662, 666 (1855); *State v. Morristown*, 34 N. J. Law, 445 (1871); *Griffin v. Mixon*, 38 Miss. 437, 438 (1860).—[Note by judge.]

the owners of the property had notice of the assessment and an opportunity to contest it in the courts. After stating that much misapprehension prevailed as to the meaning of the terms "due process of law," and that it would be difficult to give a definition that would be at once perspicuous and satisfactory, the court, speaking by Mr. Justice Miller, said that it would lay down the following proposition as applicable to the case: "That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." 96 U. S. 97, 24 L. Ed. 616.

This decision covers the cases at bar. The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defense going either to its validity or amount could be pleaded. In ordinary taxation assessments, if not altered by a board of revision or of equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits, and, of course, to their validity it is essential that notice be given to the tax-payer, and opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defense, all his grievances. *Reclamation Dist. No. 108 v. Evans*, 61 Cal. 104.<sup>3</sup> If property taken upon an assessment, which can only be enforced in this way, be not taken by due process of law, then, as said by Mr. Justice Miller in the *New Orleans Case*, these words as used in the constitution, can have no definite meaning. The numerous decisions cited by counsel, some of which are given in the note, as to the necessity of notice and of an opportunity of being heard, are all satisfied where a hearing in court is thus allowed.† \* \* \*<sup>4</sup>

<sup>3</sup> Note last paragraph of opinion in this case: "It may be, and probably is, true that the court below had no power to change the assessment; but of this defendant cannot complain, since the court had power to declare the assessment invalid in so far as it purported to create a charge against his land."

† *Overing v. Foote*, 65 N. Y. 269 (1875); *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289 (1878); *Cooley, Tax'n*, 265, 266, 298; *Thomas v. Gain*, 35 Mich. 155, 164, 24 Am. Rep. 535 (1876); *Jordan v. Hyatt*, 3 Barb. (N. Y.) 275, 283 (1848); *Wheeler v. Mills*, 40 Barb. (N. Y.) 646 (1863); *Ireland v.*

<sup>4</sup> The leading case on the requirement of notice is *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289 (1878). See, also, *Central of Georgia Ry. v. Wright*, 207 U. S. 127, 28 Sup. Ct. 47, 52 L. Ed. 134 (1907).

As to notice before distraining goods for nonpayment of taxes, see *Cooley, Taxation*, pp. 441-443.

## FELSENTHAL, v. JOHNSON.

Supreme Court of Illinois, 1882. 104 Ill. 21.

WALKER, J. This was a bill filed to restrain the collection of taxes levied for state, county, and local purposes, for the year 1878, against appellants, as private bankers. They furnished the assessor with a list of what they claim was all of the property in their hands subject to taxation. The assessor subsequently notified them to appear on a specified day, for the purpose of fixing the assessable amount of their property. One of the members of the firm applied at the office of the assessor at the time named, and submitted to an examination as to the taxable property in their hands. The valuation was not then fixed. One of appellants says he asked if his explanation was satisfactory; when the assessor replied he would let him know, but never gave him any notice.

The assessor fixed the value of the property at a much larger sum than it was returned by appellants, and it is claimed, and there is evidence tending to show, appellants were not notified of the amount of the valuation. The hearing before the assessor was on the 13th day of August, 1878. Felsenthal swears he accidentally learned that the assessor had fixed the value higher than he had returned it, some days after, while the county equalizing board was in session, and that he filed with the clerk of the board of commissioners objections to the amount fixed by the assessor, and that the clerk said to him he would inform him when it would be necessary to testify before the board. The clerk testifies that he has no recollection of the matter, nor does the record show anything in reference to it. He says he directed parties to file the objections with the committee on equalization, etc., which was in daily session; that the committee, when it acted on objections, usually returned the papers to him, and he filed them, but was unable to find any as to this assessment. Felsenthal testifies the clerk informed him the committee referred the objections back to the assessor, but the clerk does not sustain him in this. It is not claimed that appellants, or any one for them, appeared before the committee to obtain a reduction or to have the claim of over-assessment corrected. No other steps were taken than what is claimed above. On the hearing the court below dismissed the bill, and appellants seek to reverse that decree.

Rochester, 51 Barb. (N. Y.) 416, 430, 431 (1868); State v. Jersey City, 24 N. J. Law, 662, 666 (1855); State v. Newark, 31 N. J. Law, 363 (1865); State v. Trenton, 36 N. J. Law, 499, 504 (1873); State v. Elizabeth City, 37 N. J. Law, 357 (1875); State v. Plainfield, 38 N. J. Law, 97 (1875); State v. Newark, 25 N. J. Law, 399, 411, 426 (1856); Patten v. Green, 13 Cal. 325 (1859); Mulligan v. Smith, 59 Cal. 206 (1881); Griffin v. Mixon, 38 Miss. 438 (1860); County of San Mateo v. Southern Pac. R. Co. (C. C.) 8 Sawy. 238, 13 Fed. 722 (1882); County of Santa Clara v. Same (C. C.) 9 Sawy. 165, 18 Fed. 385 (1883); Darling v. Gunn, 50 Ill. 424 (1869). See, also, Gatch v. City of Des Moines, 63 Iowa, 718, 18 N. W. 310, 311, 313 (1884); Wallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369 (1896).—[Note by judge.]



In matters of revenue, courts of equity rarely grant relief, and never where the party has means of obtaining relief at law, and fails or refuses to pursue his legal remedy, or shows <sup>an</sup><sup>1</sup> equitable excuse for such failure. The statute has provided ample means for the correction of errors in assessments of property for taxation, by an appeal to the town board of review, and again to the county board. These appeals are provided for and regulated by the eighty-sixth and ninety-seventh sections of the Revenue Law. The first provides that property assessed as this was, after the fourth Monday of June, the time for the meeting of the town board of review, shall be subject to complaint to the county board, under the rules regulating the town board of review. The ninety-seventh section provides there shall be a meeting of the county board on the second Monday of July in each year, and on the application of any person considering himself aggrieved, "they shall review the assessment, and correct the same, as shall appear to be just." The statute thus provides ample means for all grievances in the assessment of property for taxation, whether by overvaluation, or by imposing the assessment on property not subject to taxation, or on property not owned or liable to be assessed to the taxpayer. It embraces every kind of grievance in the assessment; and even where there is a supposed grievance, the taxpayer has but to appear, make his complaint known, and have a hearing. If appellants felt themselves aggrieved they had but to appear and state their complaint, and be heard. This they failed to do, and so failing, chancery will not assume jurisdiction to review the assessment. They failed to pursue their remedy at law, and cannot appeal to equity for relief against their own neglect.

It is urged that relief should be granted under the equity head of accident. We fail to see that there was any accident. Appellants knew the amount of the assessment in time to appeal to the county board to have it corrected. They knew that the board was in session, and they failed to attend and prove there was an overassessment. Although the assessment was made too late for an appeal to the town board of review, it was in time for a review by the county board, and they were apprised of the fact, and made some slight effort to bring the matter before the board. Felsenthal testifies he filed objections with the clerk, who promised to notify him when he should appear before the board to testify. If he constituted the clerk, as he says, his agent, and the clerk failed to notify him, the neglect of his agent was his, and he must be held responsible for that neglect. No such accident is shown as equity regards as ground for relief. To entitle a party to equitable relief when he has not availed of his legal remedy, he must have used every reasonable effort to have employed it.

It is urged that the assessor, without notice or hearing, changed the assessment of appellant's property, and this is ground for equitable relief, and decisions of this court are cited in support of the doctrine.

<sup>1</sup> So in original. Should probably read: "and shows no."

The authorities have no application, because the record fails to show that such a change was made by the assessor. There was but one assessment on his books, and that was made after one of appellants submitted to the examination on the 13th day of August. The assumption seems to be that the schedule returned by appellants was the assessment, and that the larger sum placed on the assessor's books was an alteration of the assessment. This is not true. The assessor, and not the taxpayer, makes the assessment. The latter is required to make and return the schedule to enable the assessor to perform the duty of assessing the value of the property. Until the assessor approves the schedule, or makes a new one and fixes the valuation of the property, there is no assessment. The act is official, and must be performed by the assessor. It is his judgment, and not that of the taxpayer, that controls. We fail to find that the valuation of this property was ever changed after it was fixed by the assessor, whose duty it was to fix the amount. The cases therefore have no application to the facts in this case. Appellants objected that the value was placed at too large a sum. The assessor's valuation is presumed by the law to be correct, and it devolves upon the taxpayer to overcome that presumption by proof. He offered no proof to establish that objection. He did not appear before the committee and have a time fixed for a hearing, nor did he do any act to have his evidence heard. He could have availed of the means of learning when he could be heard by the committee.

There is no evidence that the committee referred this objection back to the assessor. It only appears that the clerk informed one of appellants that there was such action by the committee. It was but hearsay evidence, at most. If such was the action, we presume it appears of record somewhere, or there was legitimate evidence of the fact, and could have been produced. But if the evidence had been heard, we do not determine now whether it would constitute ground for relief.

The decree of the court below is affirmed.

Decree affirmed.<sup>2</sup>

<sup>2</sup> See, also, *Corcoran v. Board of Aldermen of Cambridge*, 199 Mass. 5, 85 N. E. 155, 18 L. R. A. (N. S.) 187 (1908): "If the right to a hearing is given upon an appeal, or upon an application for an abatement, it is sufficient."

## 25 PITTSBURGH, C., C. &amp; ST. L. RY. CO. v. BACKUS.

Supreme Court of United States, 1894. 154 U. S. 421, 14 Sup. Ct. 1114,  
38 L. Ed. 1031.

In Error to the Supreme Court of the State of Indiana.

Action to restrain the collection of taxes. The court rendered judgment for defendants, which, on appeal, was affirmed by the Supreme Court of the state. 133 Ind. 625, 33 N. E. 432.

Mr. Justice BREWER delivered the opinion of the court. \* \* \*

It is contended specifically that the act fails of due process of law respecting the assessment, in that it does not require notice by the state board at any time before the assessments are made final; and several authorities are cited in support of the proposition that it is essential to the validity of any proceeding by which the property of the individual is taken that notice must be given at some time and in some form before the final adjudication. But the difficulty with this argument is that it has no foundation in fact. The statute names the time and place for the meeting of the assessing board, and that is sufficient in tax proceedings; personal notice is unnecessary.

In State Railroad Tax Cases, 92 U. S. 610, 23 L. Ed. 663, are these words, which are also quoted with approval in the Kentucky Railroad Tax Cases, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414: "This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked."

Again, it is said that the act does not require the state board to grant to the railroad companies any hearing or opportunity to be heard for the correction of errors at any time after the assessments have been agreed upon by the board, and before they are made final and absolute, or before the final adjournment of the board, and also that it gives to the board arbitrary power to deny to plaintiffs any hearing at any time; but the fact and the law are both against this contention. The plaintiff did appear before the board, and was heard, by its counsel and through its officers; and the construction placed by the Supreme Court of the state on the act—a construction which is conclusive upon this court—is that the railroad companies are given the right to be present and to be heard.

It is urged that the valuation as fixed was not announced until shortly before the adjournment of the board, and that no notice was given of such valuation in time to take any steps for the correction of errors therein. If by this we are to understand counsel as claiming that there must be notice and a hearing after the determination by the assessing board, as well as before, we are unable to concur with that view. A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital. Rehearings, and new trials, are not es-



sential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the constitution in this respect. It not infrequently happens in this as in all other courts that decisions are announced and judgments entered on the last day of the term, and too late for the presentation or consideration of any petitions for rehearing or motions for a new trial. Will any one seriously contend that a judgment thus entered is entered in defiance of the requirements of due process of law, and that a party, having been fully heard once upon the merits of his case, is deprived of the constitutional protection because he is not heard a second time?

Equally fallacious is the contention that because to the ordinary taxpayer there is allowed not merely one hearing before the county officials, but also a right of appeal with a second hearing before the state board, while only the one hearing before the latter board is given to railroad companies in respect to their property, therefore the latter are denied the equal protection of the laws. If a single hearing is not due process, doubling it will not make it so; and the power of a state to make classifications in judicial or administrative proceedings carries with it the right to make such a classification as will give to parties belonging to one class two hearings before their rights are finally determined, and to parties belonging to a different class only a single hearing. Prior to the passage of the court of appeals act by Congress, in 1891, a litigant in the Circuit Court, if the amount in dispute was less than \$5,000, was given but a single trial, and in that court; while, if the amount in dispute was over that sum, the defeated party had a right to a second hearing and in this court. Did it ever enter into the thought of any one that such classification carried with it any denial of due process of law? <sup>5</sup> \* \* \*

### 26 STATE RAILROAD TAX CASES.

Supreme Court of United States, 1875. 92 U. S. 575, 23 L. Ed. 663.

MILLER, J. \* \* \* There is, however, an objection urged to the conduct of the board of equalization, resting on the action of the board in these particular cases, in which they are charged with a gross violation of the law to the prejudice of the corporations, which we will consider.

7 The statute requires the proper officers of the railroad companies to furnish to the State Auditor a schedule of the various elements already mentioned as necessary in applying the statutory rule of valuation. It is charged that the board of equalization increased the estimates of value so reported to the Auditor, without notice to the companies, and without sufficient evidence that it ought to be done; and it is stren-

<sup>5</sup> See Lutz, State Tax Commissions, pp. 201, 260, 630.

uously urged upon us that for want of this notice the whole assessment of the property and levy of taxes is void.

It is hard to believe that such a proposition can be seriously made. If the increased valuation of property by the board without notice is void as to the railroad companies, it must be equally void as to every other owner of property in the state, when the value assessed upon it by the local assessor has been increased by the board of equalization. How much tax would thus be rendered void it is impossible to say. The main function of this board is to equalize these assessments over the whole state. If they find that a county has had its property assessed too high in reference to the general standard, they may reduce its valuation; if it has been fixed too low, they raise it to that standard. When they raise it in any county, they necessarily raise it on the property of every individual who owns any in that county. Must each one of these have notice and a separate hearing? If a railroad company is by law entitled to such notice, surely every individual is equally entitled to it. Yet if this be so, the expense of giving notice, the delay of hearing each individual, would render the exercise of the main function of this board impossible. The very moment you come to apply to the individual the right claimed by the corporation in this case, its absurdity is apparent. Nor is there any hardship in the matter. This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked.

As we do not know on what evidence the board acted in regard to these railroads, or whether they did not act on knowledge which they possessed themselves, and as all valuation of property is more or less matter of opinion, we see no reason why the opinion of this court, or of the Circuit Court, should be better, or should be substituted for that of the board, whose opinion the law has declared to be the one to govern in the matter. \* \* \* 6

<sup>6</sup> See Illinois Revenue Law 1898, § 35: " \* \* \* The assessment of any class of property, or of any township or part thereof, or any portion of the county, shall not be increased until the board shall have notified not less than fifty of the owners of property in such township, or part thereof, or portion of the county of such proposed increase, and given them, or any one representing them, or other citizens of said territory, an opportunity to be heard."

## KUNTZ v. SUMPTION.

Supreme Court of Indiana, 1889. 117 Ind. 1, 19 N. E. 474, 2 L. R. A. 655.

Appeal from circuit court, Randolph county.

ELLIOTT, C. J. The board of equalization of Randolph county entered an order reading thus: "On motion, the board increased the assessment of Peter Kuntz on personal property twenty thousand dollars." Prior to the meeting of the board Kuntz had listed his property for taxation. He was subpoenaed before the board, and testified as a witness, but did so under protest.

We have given to the principal question in this case much and careful study, and we are compelled to hold that the statutory provisions concerning the authority of the county board of equalization to increase the valuation of the property of an individual taxpayer listed by him for taxation are unconstitutional. We limit our decision to this point, and mark the limit as distinctly and definitely as we can. We do not affirm that the provisions of the statute conferring authority upon the county board to change the general levy are invalid, nor do we affirm that they are invalid in so far as they confer authority to make orders affecting the taxpayers generally. We do, however, affirm that they are invalid in so far as they assume to confer authority upon the board to conclusively change the valuation placed upon property by an individual taxpayer, or to add property to his list. We are satisfied that the statute is in conflict with the Constitution, for the reason that it assumes to confer authority upon the board to add to a citizen's taxes without giving him an opportunity to be heard, and thus denies him due process of law.

Our judgment is that after a citizen has listed his property no change in the list can be compulsorily made by an officer or tribunal whose decision is final, until, by due process of law, he has had an opportunity to vindicate the correctness of his list, or resist an attempt to increase the valuation.) The presumption is that men obey the law and act in good faith, and under this long-settled rule it must be held that, until the contrary is shown, the taxpayer is entitled to have his list accepted as correct and just. The contrary cannot be legally and conclusively shown, unless he has an opportunity to be heard, and this opportunity he cannot have unless notice is given him before a conclusive decision is made. The statute does not provide for notice to taxpayers whose taxes it is proposed to increase, and this infirmity destroys it in so far as it affects such citizens. It is not enough that in fact the taxpayer does have some notice or information, for the law must provide for notice, or else no legal notice can be given. A man may be subpoenaed as a witness in an action pending against him, but unless he is summoned or notified as a party under some law authorizing a summons or a notice the proceedings are utterly void. A man may be served with a written notice that a petition for a ditch is pending, but, if there is no law authorizing notice, it will be unavailing. A no-



tice not authorized by law is in legal contemplation no notice. We do not assert that the proceedings would be void where there is some notice, although not given in strict conformity to law; for we know that a defective notice, assumed to be given under a statute, will be sufficient to uphold jurisdiction as against a collateral attack. *Montgomery v. Wasem*, 116 Ind. 343, 15 N. E. 795 (this term); *Hume v. Conduitt*, 76 Ind. 598.

But there must be an assumption of the right to give notice, and there must be some law authorizing this assumption. At all events, there must be color of right, and without a law authorizing notice there can be none. We approve, as fully as language can do, the doctrine of former decisions, that the legislature has ample authority to prescribe what the notice shall be. *Johnson v. Lewis*, 115 Ind. 490, 18 N. E. 7; *Garvin v. Daussman*, 114 Ind. 429, 16 N. E. 826, 5 Am. St. Rep. 637; *Carr v. State*, 103 Ind. 548, 3 N. E. 375; *Hobbs v. Board*, 103 Ind. 575, 3 N. E. 263.

We affirm, too, that whether the notice is by publication or by personal service, it will sustain jurisdiction, provided there is back of it some law providing for notice. While affirming these various propositions, we also affirm that, where individual property rights are affected, there must be provision for notice made by law before there can be a final and conclusive adjudication. Only the law can prescribe the form of the notice, and the law must provide for it. Where, therefore, individual rights are concerned, and the matter is one upon which a party is entitled to be heard, a proceeding conclusively and finally disposing of individual property rights will be void, unless founded upon a law providing for notice of some kind.<sup>7</sup> (Where the matter to be decided is one of pure discretion, and the tribunal decides upon its own judgment, unaided by evidence, then notice is not essential.) *State v. Johnson*, 105 Ind. 463, 5 N. E. 553; *Fries v. Brier*, 111 Ind. 65, 11 N. E. 958; *Trimble v. McGee*, 112 Ind. 307, 14 N. E. 83; *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600.

But in adding to property listed by the taxpayer, or in increasing the valuation put upon listed property by him, a board of equalization does not exercise arbitrary power or unrestricted discretion. On the contrary, it must be guided by the law and the facts, and has no right to add to the list of the taxpayer property he does not own, nor has it authority to increase the valuation of property without giving the taxpayer legal notice; thus affording him an opportunity to adduce evi-

<sup>7</sup> That the requirement of notice will be implied, see *Harlow v. Pike*, 3 Greenl. (Me.) 438 (1825); *Japanese Immigrant Case*, 189 U. S. 86, 23 S. Ct. 611, 47 L. Ed. 721 (1903), p. 208, *infra*; also *Corcoran v. Board of Aldermen of Cambridge*, 199 Mass. 5, 85 N. E. 155, 18 L. R. A. (N. S.) 187 (1908). Moreover, see *Detroit, etc., Ry. Co. v. Osborn*, 189 U. S. 383, 391, 23 Sup. Ct. 540, 543, 47 L. Ed. 860 (1903): "The cause was submitted on petition and answer, and the petition alleged 'that notice was given by respondent [the commissioner of railroads] to relator and the Union Terminal Association, and the hearing had, at which relator's representative objected to the making of said order.' It is therefore not open to the plaintiff in error (the railway) to complain that the statute did not provide for notice." Also, see page 182, note.

dence or furnish information. It is a serious matter to charge a person with fraudulently or falsely listing his property; and to add to his list, or to increase the valuation of property, imposes upon him a burden, for it deprives him of property in the form of money. (That notice is required in all cases where individual property rights are involved, and the matter is not one of pure discretion, has been again and again decided by our own and other courts.) *Strosser v. City*, 100 Ind. 443; *Troyer v. Dyar*, 102 Ind. 396, 1 N. E. 728; *Jackson v. State*, 103 Ind. 250, 2 N. E. 742; *Johnson v. Lewis*, 115 Ind. 490, 18 N. E. 7; *Board v. Gruver*, 115 Ind. 225, 17 N. E. 290, and cases cited. That the notice must be authorized by law is affirmed by many cases. The rule is thus stated in one case: "It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them a right to a hearing, and an opportunity to be heard." *Stuart v. Palmer*, 74 N. Y. 188, 30 Am. Rep. 289.

Judge Cooley, in speaking of the correction of tax lists, says: "It is a fundamental rule that in judicial or quasi judicial proceedings, affecting the rights of the citizen, he shall have notice, and be given an opportunity to be heard, before any judgment, decree, order, or demand shall be given and established against him. Tax proceedings are not in the strict sense judicial, but they are quasi judicial, and, as they have the effect of a judgment, the reasons which require notice of judicial proceedings are always present when the conclusive steps are to be taken." Cooley, *Tax'n* (2d Ed.) 363. An author who has recently written on the subject concludes his discussion by saying: "There is really but one logical and consistent position in the matter, and that is that a statute that does not provide for notice is invalid." Lewis, *Em. Dom.* § 368. A very thorough discussion of the question will be found in *Johnson v. Railroad Co.*, 23 Ill. 202. We need not, however, look beyond our own reports, for our own decisions declare that the statute itself must provide for notice. *Campbell v. Dwiggin*s, 83 Ind. 473; *Jackson v. State*, 104 Ind. 516, 3 N. E. 863; *Fries v. Brier*, 111 Ind. 65, 11 N. E. 958; *Johnson v. Lewis*, *supra*.

We said in *Jackson v. State*, *supra*, that "the notice must assume to be such as the law requires, but, in order to repel a collateral attack, it need not be a valid notice"; and in *Garvin v. Daussman*, *supra*, we said: "It is without doubt essential to the validity of every law under which proceedings may be had for the taking of property, or to impose a burden upon it which may result in taking it, that the law make provision for giving some kind of notice, at some stage in the proceeding." The ultimate conclusion which we reach is that where a conclusive decision is authorized the statute itself must provide for notice, and secure it to the taxpayer, not as matter of favor, but as a matter of right.

We agree with the appellee's counsel that the board of equalization is not a judicial tribunal, in the strict sense of the term; but, while this is true, it is also true that it possesses functions of a judicial na-

ture. *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192. Judicial powers are, as we said in the case cited, lodged in the courts; and, where the Constitution distributes the judicial power, it can only be exercised by the tribunal named by the constitution, and constituted as the Constitution provides. *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567; *Chandler v. Nash*, 5 Mich. 409; *Alexander v. Bennett*, 60 N. Y. 204; *Van Slyke v. Insurance Co.*, 39 Wis. 390, 396, 20 Am. Rep. 50; *Gibson v. Emerson*, 7 Ark. 172; *Gregory v. State*, 94 Ind. 384, 48 Am. Rep. 162; *Shoultz v. McPheeters*, 79 Ind. 373.

But while we hold that the authority of the board of equalization is not judicial, yet we also hold that it is in its nature so far judicial as to require notice to one whose individual rights are directly affected. We are inclined to concur with appellee's counsel that the judgment of the board is conclusive, but to that proposition we add that it is only so where there is jurisdiction, and that notice to one whose list is to be added to or whose valuation is to be increased is essential to give jurisdiction. *School Dist.'s Appeal*, 56 Pa. 315; *Osborn v. Inhabitants*, 6 Pick. (Mass.) 98; *Hughes v. Kline*, 30 Pa. 227; *Macklot v. City*, 17 Iowa, 379; *Deane v. Todd*, 22 Mo. 90; *McIntyre v. Town*, 43 Wis. 620.

The fact that the judgment is conclusive supplies a strong reason for holding that the taxpayer should have an opportunity to be heard, and that he should be heard before his list or his valuation is set aside or changed. The power to hear and determine, where there is a question admitting of controversy, and the entire matter is not one of absolute and arbitrary discretion, implies that, in reason and justice, the law should, by making provision for notice, give the parties an opportunity to be heard; for otherwise it cannot be justly said that there is due process of law.

Thus far we have proceeded upon the assumption that the statute does not provide for notice to the individual taxpayer whose list is to receive additions, or whose valuation is to be increased, and, if this assumption cannot be made good, our reasoning is invalid. It is, however, not difficult to prove the validity of our assumption. The statute itself supplies the requisite proof. It does provide notice sufficient for two classes of judgments, but for no others. It provides for notice sufficient as to all general changes in the levy, and sufficient as to all who have complaints to make, and over these matters jurisdiction arises when the notice is given as the statute directs. (But there is no provision for notice to the individual taxpayer whose list is to be added to or whose valuation is to be increased.) Its provisions on the subject of notice are these: "Two weeks' previous notice of the time, place, and purpose of such meeting shall be given by the county auditor in some newspaper of general circulation, printed and published in the county; or, if no newspaper be published in the county, then by posting up notices in three public places in each township in the county." Section 6397, Rev. St. 1881.



This notice, it is obvious, cannot require every taxpayer in the county to be in attendance at the meeting of the board to see that no additions are made to his list. As additions to his list affect him as an individual, he is entitled to notice as an individual. He is not within the scope of the statute, since he is not bound to assume that there will be any change in the verified list given by him to the assessor. His rights are distinct from those of the public, and from the rights of those persons who have complaints to make. (Those who believe themselves wronged by having property listed to them that they do not own, or who believe that their property has been overvalued, are actors; they move, they take the initiatory step, and they must come before the board under the notice prescribed by the statute. But with the taxpayer whose assessment is to be increased it is otherwise. He is not the actor; he does not take the initiatory step; but, on the contrary, he is passive and inactive until brought before the board by notice.) He is not under any legal obligation to move until notice comes to him. Indeed, he cannot move if he is content with his list and assessment, for there is nothing for him to do. The taxpayer who has a complaint to make occupies a position very similar to that of the plaintiff in an ordinary action, while the person whose taxes are to be increased is in a position very like that of a defendant. (We must hold that a taxpayer is entitled to notice, or else we must hold that he is bound, at his peril, to keep vigilant watch of the proceedings, lest property he does not own be assessed to him, or the valuation of his listed property be increased.) In the absence of notice to him as an individual, he is not bound to exercise any such vigilance. *Claybaugh v. Railway Co.*, 108 Ind. 262, 9 N. E. 100; *Munson v. Blake*, 101 Ind. 78.

It would be almost as unjust to compel such a taxpayer to be constantly on the watch during the meeting of the board as to compel a defendant who has failed to pay a note, violated a covenant, or committed a trespass to watch the dockets of the court during term time. The notice does no more than inform the public that the board will be in session at a designated time and place, and no one is bound to act upon the notice further than to present complaints or resist general changes in the levy. Certainly no one is bound to know that a complaint will be preferred against him affecting his individual rights. If one taxpayer is bound to keep watch during the session of the board, so are all, and the result would be that the meetings of the board would be thronged with taxpayers, or else their rights be at the mercy of the board. The organic law to which all statutes must yield does not intend that such a thing shall ever occur, for it requires notice to each person whose individual property rights may become the subject of investigation and final adjudication. This is a fundamental principle, ruling all the departments of government. A decision of a judicial nature, conclusively deciding upon individual property rights of a citizen, and imposing a burden upon him, can only be given in a proceeding of which, before a final and conclusive judgment is reached, the citizen has notice, for without such notice there cannot be due process

of law. A decision not final, but subject to review, may not necessarily require notice; but a final decision must be based on a notice provided for by law.

Judgment reversed, with instructions to overrule the demurrer to the complaint.<sup>8</sup>

### HULING v. EHRICH.

Supreme Court of Illinois, 1899. 183 Ill. 315, 55 N. E. 636.

Error to circuit court, Kankakee county.

Suit by Truman Huling against F. C. Ehrich. Bill dismissed, and complainant brings error. Reversed.

CARTWRIGHT, C. J. Truman Huling, plaintiff in error, is a resident and taxpayer of Kankakee township. In the year 1897 he made and delivered to the assessor a list of his personal property in compliance with the statute, which included \$5,000 in moneys and credits. This list was accepted by the assessor, and the total value, as fixed by the assessor and placed in his books, was \$5,595, including said amount of moneys and credits. The town board of review met June 30, 1897, and increased this assessment from \$5,595 to \$10,595 without any notice to Huling, and without his knowledge or consent, and made this record of their action: "The assessment of Truman Huling is raised to the amount of \$10,000 on his moneys and credits, which the board deems to be about right." On the assessments, so increased, of \$10,595, a tax of \$1,100.83 was levied.

Huling first learned of the increase when the collector attempted to collect the tax, and he then tendered \$581.33, the proportionate amount of the tax on the assessment as first made by the assessor, and filed his bill against F. C. Ehrich, the collector, defendant in error, to enjoin the collection of \$519.50, the portion of the tax levied on the increase of \$5,000 made by the town board. The bill was answered, and the answer admitted that the tax was extended on the valuation as made by the board of review, and admitted the tender, but denied that the board of review acted without notice, and averred that the valuation was not inequitable. On a hearing, the facts alleged in the bill were proved, but the court dismissed the bill, at complainant's cost, for want of equity.

The township board of review was only authorized to act and raise complainant's assessment after giving notice in writing to him or his agent. Rev. St. c. 120, § 86. He made out and delivered to the assessor a list of his taxable property, which was accepted by the assessor. If it was proposed to increase his assessment, he was entitled to a hearing, and an opportunity to show the facts, and the board had no power, without notice to him, to increase such assessment. He had no knowl-

<sup>8</sup> Contra: *State v. New Lindell Hotel Co.*, 9 Mo. App. 450 (1881); *Lake Shore & M. S. R. Co. v. Powers* (C. C.) 138 F. 257 (1905).

edge of the increase until the collector attempted to collect the tax. The board had no jurisdiction to reassess his property, and in such case equity will restrain the collection of the illegal tax on the ground that the assessment is void as to the increase. *Cleghorn v. Postlewaite*, 43 Ill. 428; *Darling v. Gunn*, 50 Ill. 424; *McConkey v. Smith*, 73 Ill. 313; *Bank v. Cook*, 77 Ill. 622; *Camp v. Simpson*, 118 Ill. 224, 8 N. E. 308.

It is argued that, since complainant asked the aid of a court of equity and was bound to do equity, he must fail, unless he showed that the assessment was raised above the fair valuation of all his taxable property. He tendered all the tax that had been levied by authority of law, and that is all equity would require him to pay.<sup>9</sup>

It is also urged that the court properly denied relief, because no witness testified that the amount tendered was the proportionate share of the tax levied on the assessor's valuation. It is said that the court could not determine what proportion of the tax was illegal, because no witness testified to the amount. It was not necessary that there should be any such proof. The question of the proportionate amount of the tax levied on a valuation of \$10,595, arising from the original assessment of \$5,595 and the increase of \$5,000, was a mere matter of computation, and not a fact to be proved by witnesses.

The decree of the circuit court is reversed, and the cause remanded, with directions to enter a decree in accordance with the prayer of the bill. Reversed and remanded.

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TOLLMAN v. SALOMON et al.

Supreme Court of Illinois, 1901. 191 Ill. 202, 60 N. E. 809.

CARTWRIGHT, J. Appellant filed his bill in the superior court of Cook county against appellees, the tax collectors of the towns of North Chicago and South Chicago, and Samuel B. Raymond, county treasurer of Cook county, praying for an injunction against the collection of taxes claimed to be due from appellant on his personal property in said towns for the year 1900. Appellees filed a general demurrer to the bill, and in open court waived all objections and causes of demurrer because of misjoinder of defendants, and submitted the demurrer upon the single question whether the bill stated equitable grounds for the relief prayed for. The court sustained the demurrer, and, appellant standing by his bill, it was dismissed for want of equity.

The material facts stated in the bill and admitted by the demurrer are that complainant, who resides in the town of North Chicago, and has his office in the town of South Chicago, on April 16, 1900, made, signed, and swore to a schedule of his personal property located in the

<sup>9</sup> Contra: *Lake Shore & M. S. R. Co. v. Powers* (C. C.) 138 F. 257 (1905).



town of North Chicago, and a like schedule of his property located in the town of South Chicago. These schedules contained a complete statement of the personal property owned by him on April 1, 1900, in said towns, respectively, and in said schedules he gave a full fair cash value of the articles therein mentioned, as provided by the statute. The value of the property in the town of North Chicago, as stated by complainant, was \$600, and of the property in the town of South Chicago \$500. On said day he delivered the schedules to the board of assessors of Cook county, and the board afterwards met on the third Monday of June, 1900, for the purpose of revising the assessments of personal property, and placed the value of complainant's property in the town of North Chicago at \$20,000, and in the town of South Chicago at \$5,000, increasing the valuation above that given by complainant. No notice of this act was given to complainant, and he never knew that the valuation of his property had been increased above that given by him until the months of December, 1900, and January, 1901—too late to apply to the board of review.

The law creates a board of assessors for counties of the population of Cook, and the board has the powers, and is required to perform the duties, of township assessors under the law. By section 17 of the act for the assessment of property (Hurd's Rev. St. 1899, p. 1448) the assessor is required to furnish to each person a printed blank schedule for his property, with a printed notice that the schedule must be filled out, sworn to, and returned, and that such person is to give the full fair cash value of the articles mentioned in the schedule. Complainant complied with the notice, and made return of his property, with his estimate of the fair cash value thereof. It has constantly been held that where a property owner so makes out and delivers to the assessor a list of his taxable property, with the valuation thereof, and the schedule and valuation are accepted by the assessor as correct, they cannot afterwards be altered or changed without first giving notice to the party assessed. *Cleghorn v. Postlewaite*, 43 Ill. 428; *McConkey v. Smith*, 73 Ill. 313; *Bank v. Cook*, 77 Ill. 622; *Camp v. Simpson*, 118 Ill. 224, 8 N. E. 308; *Huling v. Ehrich*, 183 Ill. 315, 55 N. E. 636; *Ayers v. Widmayer*, 188 Ill. 121, 58 N. E. 956. There can be nothing in the nature of a reassessment without notice to the party affected.

There is some argument about changes in the statute at different times, but the rule would be the same under any statute. Every property owner has a right to a hearing in such a case, and an assessor cannot secretly reassess such owner without giving him an opportunity to contest the justice of the change. *Cooley, Tax'n*, 266; *Desty, Tax'n*, 596. That rule is founded on the plainest principles of justice, and is enforced by the guaranties of the constitution. The bill, however, in this case does not raise any question of reassessment or an increase of assessment, and does not show that the valuations fixed by the

complainant were ever accepted by any assessor or deputy or the board of assessors. A property owner has the right to give his estimate of the value of his property, but the law requires that the assessor shall thereupon assess the value of such property, and enter the valuation in his books. The assessor is to determine and fix the fair cash value of all items of personal property. If he accepts and adopts the valuation of the property owner, he cannot change it without notice to such owner; but, so far as appears, there was but one assessment, and complainant's valuation was never accepted, and there was no increase or modification of the value first fixed under the statute.

The court was right in sustaining the demurrer. The decree is affirmed. Decree affirmed.

### TOMLINSON v. BOARD OF EQUALIZATION.

Supreme Court of Tennessee, 1889. 88 Tenn. 1, 12 S. W. 414, 6 L. R. A. 207.

LURTON, J. \* \* \* The complaint made in the petition is that it [the board of equalization] refused to hear witnesses offered by complainant in support of his complaint as to an excessive assessment as to valuation. In this, did they "exceed their jurisdiction," or "act illegally"? To determine this, we must not only consider the language of the act defining their duties, but consider the general nature and scope of the powers conferred upon them. They are styled a "board of equalization." They are charged, primarily, with the duty of "examining" and "equalizing" assessments. This duty they are expected, most manifestly, to perform, not upon testimony, but upon a "comparing" the assessments in one district or neighborhood with another—one piece of property with the assessment upon another of equal value. Clearly, this is to be done upon their own knowledge of the comparative valuations, and the end to be reached is an equalization whereby discriminations in favor of one, or against another, are to be corrected. In addition to this, they are to correct mistakes made by the assessor, and eliminate from the list property exempt under the law from assessment.

Finally, they are empowered to hear and adjust complaints from any party feeling aggrieved on account of excessive taxation, where in their judgment justice demands it. How are they to "hear and adjust" such complaints? Petitioner's contention is that they must hear witnesses produced by him; that he has a right to examine such witnesses, and cross-examine such as are produced against him. In other words, that the act contemplates a regular trial, according to the ordinary course of law, and the decision according to the weight of the proof. We have seen that, with reference to the primary duty of the board—that of equalizing assessments—the act contemplates no

issue of fact or hearing of evidence, but that the equalization is to be brought about by a comparison of assessments and the knowledge they have of the relative values of different pieces of property. Can the law contemplate any very different method of correcting an excessive assessment? The knowledge of relative values—of comparative values—which they have as citizens and freeholders, and which they obtain from an examination and comparison of the assessment lists, will, in the vast majority of cases, enable them to act justly upon the complaint. But cases may occur where these means are, in their judgment, unsatisfactory. In such case, the act declares that the “board shall have the right to summon before them witnesses, who shall be disinterested freeholders; and the sworn testimony of three such witnesses concerning same will be sufficient evidence upon which such board may act.” The “board shall have the right” to summon before them disinterested freeholders is the language of the act. Does this power conferred make it their duty to either have witnesses brought by the party making complaint, or require them in all cases to summon witnesses upon such complaint being made; or is the hearing of witnesses a matter wholly in their discretion? We think the statute means no more than it plainly discloses.

To hold that it was the duty to permit the examination of witnesses offered by a complainant would imply a duty to the state and county to hear and examine witnesses to sustain the assessment. All this would imply a trial, and a judgment upon weight of proof. The question of valuation is altogether a matter of opinion. Before questions of opinion the greatest diversity may be expected. The sessions of this board terminate in two weeks; and at the end of that time they are required to return the assessment lists, and their corrections, to the clerk of the county court. In populous counties the assessments reach into the thousands. That each taxpayer should have the right to come with his witnesses, and have them heard, and be heard by counsel, would result in such delay and embarrassment as to amount to a great public peril with regard to the assessment of the public revenues. No legislative body could have seriously contemplated such a tribunal to determine a mere question of an excessive valuation for purpose of assessment. Occasional instances of excessive assessments may occur; but they had better be borne than that such a court should be created to settle them. The taxpayer in the first instance may make his representations to the assessor. If he overassess him, he may carry the matter to a board of disinterested freeholders, acting under oath. If they upon their own knowledge, agree with the assessor, and, upon a “comparison,” find no case for a reduction of or purpose of equalization, the chances are that the assessment is not far wrong. If he cannot induce the board to think that it is a case where they ought, for their own enlightenment, exercise the power they have to summon witnesses of their own selection, he must submit.



The board was not "exceeding its jurisdiction," or "acting illegally," in refusing to have the witnesses offered by petitioner; and it had a right to refuse to summon witnesses of its own selection, if it deemed that justice did not demand evidence from witnesses. \* \* \* 10

### EARL, et al. v. RAYMOND, County Treasurer.

Supreme Court of Illinois, 1900. 188 Ill. 15, 59 N. E. 19.

Appellants filed their bill in the circuit court of Cook county to enjoin the collection of the taxes extended upon the increased valuation of their property, made by the board of review of that county. The record shows that appellants filed with the board of assessors a schedule of their personal property, placing an aggregate valuation thereon of \$26,005; that the board of assessors found the full value to be \$27,500, and assessed the property at \$5,500, and returned the assessment to the board of review. The board of review, believing the property had not been adequately assessed, caused a notice to be served upon appellants to appear upon a day certain, and show cause why their assessment should not be increased. Pursuant to the notice, appellants' manager appeared before the board, and was referred to one member thereof, who examined him in reference to appellants' assessment. Subsequently the entire board of review, as appears from the evidence, passing upon the assessment, in consideration of the facts and of the

<sup>10</sup> Compare *Ekin v. United States*, 142 U. S. 651, 663, 12 Sup. Ct. 336, 35 L. Ed. 1146 (1892).

Under statutory provisions, assessing board may be required to hear witnesses. *People ex rel. Bronx Gas & Electric Co. v. Feitner*, 43 App. Div. 198, 59 N. Y. Supp. 327 (1899); *People ex rel. Manhattan Co. v. Barker*, 152 N. Y. 417, 46 N. E. 875 (1897).

As to the former practice of accepting the tax-payer's oath as conclusive upon the amount of his assessment, see *People ex rel. Buffalo, etc., Co. v. Barker*, 48 N. Y. 70, 74-77; *Inhabitants of Newburyport v. County Commissioners*, 12 Metc. (Mass.) 211.

The same practice is commonly followed with regard to the qualifications of electors, so far as the action of election or registration officers is concerned.

"Practically, the law leaves it to the conscience of the person offering to vote to decide whether he can or will do so when his right is challenged. The inspectors cannot do more than to make use of the machinery provided by the law to test the voter's legal qualifications, and they cannot decide upon the truth or falsity of the answers to their questions. The law provides for the punishment of a person who falsely personates a registered voter; and the proposed elector, who is challenged for that cause, if he persists in his attempt to vote, may accomplish his purpose, but at the peril consequent upon false swearing and of false personation. If, with all the safeguards with which popular elections are legally and naturally surrounded, frauds are perpetrated, the tribunals are open, and laws and a system of procedure exist for the punishment of the offenders, and for the rectification of consequent errors, in behalf of an individual whose legal rights are affected; and legislative bodies are judges as to the qualifications, returns, and elections of their members." *People ex rel. Stapleton v. Bell*, 119 N. Y. 175, 23 N. E. 533 (1890); *Gillespie v. Palmer*, 20 Wis. 544 (1866), post, p. 356. 533 (1890); *Gillespie v. Palmer*, 20 Wis. 544 (1866), post, p. 356.

information obtained upon the hearing of their agent before the one member of the board, and the facts and information obtained by each member thereof from men engaged in the same line of business as appellants, from their commercial rating, their standing at the banks, from financiers in the city, and from other sources, found the full valuation of their personal property to be \$40,000, and increased the assessment of the same to \$8,000, and returned this assessment to the county clerk. On the hearing of the cause the court below dismissed the bill for want of equity, and appellants now prosecute this appeal.

WILKIN, J. (after stating the facts). The action of the board of review in raising appellants' assessment is authorized by that portion of paragraph 2 of section 35 of the revenue act of 1898 (Laws 1898, p. 48), which reads as follows: "The board also, upon its own motion, may increase, reduce or otherwise adjust the assessment of any individual or corporation, and shall have full power over the assessment of any individual or corporation, and shall have full power over the assessment and may do anything in regard thereto that the assessors might and could originally have done, but no assessment shall be increased until the person or corporation to be affected shall have been notified and given an opportunity to be heard except as hereinafter provided."

It is well-settled law that courts of equity will never entertain a bill to restrain the collection of a tax except in cases where the tax is unauthorized by law, or where it is assessed upon property which is exempt from taxation, or where the property has been fraudulently assessed at too high a rate. *Porter v. Railroad Co.*, 76 Ill. 561. It is obvious that the case at bar comes within neither of the first two exceptions. If appellants are entitled to relief in this case, they must have shown that their property has been fraudulently assessed at too high a rate. While the bill filed alleges fraud on the part of the board of review, we find no evidence in the record sufficient to sustain such a charge.

Counsel for appellants urge that the hearing before the board of review was not such a hearing as gave the board jurisdiction to make the increased assessment complained of; that the assessment books should show a finding of the full value as well as the assessed value of the property; and that the action of the board of review was arbitrary and invalid. That the hearing accorded appellants was not a proper one we do not think is sustained by the former decisions of this court. All bodies composed of a number of persons may, and generally do, act through committees of one or more to procure facts in reference to the matter to be acted upon, and receive recommendations as to the action that should be adopted. This was the procedure in the case at bar, and is a well-recognized practice. *Beers v. People*, 83 Ill. 488; *Porter v. Railroad Co.*, *supra*. The raising of appellants' assessment was the act of the entire board, and not of a single member thereof, and is fully warranted by the statute.

Appellants' contention that the action of the board of review is invalid, for the reason that the witnesses from whom they obtained information as to the value of appellants' property were not called in and sworn, and an opportunity given for cross-examination, is not well founded. The law gives the board the power, and imposes upon it the duty, of changing any assessment which, in their opinion, may be incorrect; and, in fixing the valuation to be placed upon the taxpayer's property, the board may act upon their own knowledge, information, and judgment, and are not concluded by the statements of the owner of the property. *Gas Co. v. Higby*, 134 Ill. 557, 25 N. E. 660, and cases there cited. In the case at bar the action of the board of review in increasing appellants' assessment was within the scope of their authority. They had jurisdiction of the person and of the subject-matter, and no fraud of any kind, either in the procedure of the board or in the conclusion reached by them, being shown, the court below had no power to set aside the assessment nor to restrain the collection of the tax. *Railway Co. v. People*, 119 Ill. 182, 10 N. E. 397; *Bridge Co. v. People*, 161 Ill. 514, 44 N. E. 206; *Coal Co. v. People*, 157 Ill. 543, 41 N. E. 874.

We are of the opinion that the circuit court committed no error in dismissing the bill, and the judgment will accordingly be affirmed. Judgment affirmed.

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#### AMERICAN EXPRESS CO. v. RAYMOND et al.

Supreme Court of Illinois, 1901. 189 Ill. 232, 59 N. E. 528.

CARTER, J. The court below, on the hearing, dismissed appellant's bill, which it had filed to enjoin the collection of the taxes assessed and extended in 1899. The complaint was and is that the board of review of Cook county increased the assessed valuation without affording appellant an opportunity to be heard. It is not denied that appellant was properly notified to appear before the board, and show cause why the assessment on its property should not be increased, nor that appellant's agent appeared in pursuance of such notice; but the point made is that there was no hearing of facts relating to the value of appellant's property, but only an informal conversation between the members of the board and appellant's agent, together with the agents of other express companies who were present at the same time, relative to their respective assessments.

It appears that, adopting the suggestion of a member of the board, the board and the representatives of the several companies assembled around a table in the office of the board, and took up the matter of the assessment of all such companies together. The board heard what these representatives had to say, but it does not appear that specific valuations were discussed, nor that any decision was announced or reached. The meeting adjourned, or at any rate the members of it separated, and the



appellant claims that its assessment was afterwards increased without its knowledge or any opportunity to be heard in reference thereto, and without any notice or information from the board as to the evidence or grounds upon which such increase was based. If appellant desired to make any showing to the board that the schedule and valuations of its property were correct, and should not be changed or increased, it had the opportunity to do so, and it cannot complain that the board did not produce the evidence upon which it acted in making the increase. We think appellant is correct in its contention that the assessment record should show the increased valuations of the different kinds of property as made by the board, and not merely the assessed valuation of one-fifth of the total. But this omission is not sufficient to sustain the bill to enjoin the collection of the tax. The case is substantially the same as that of *Earl v. Raymond*, 188 Ill. 15, 59 N. E. 19, and of *Kimbark v. Same*, 188 Ill. 66, 59 N. E. 1133, and must be governed by those decisions. See, also, *Ayers v. Widmayer*, 188 Ill. 121, 58 N. E. 956, and *Pratt v. Raymond*, 188 Ill. 469, 59 N. E. 16.

The decree will be affirmed. Decree affirmed.

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40 AUFFMORDT v. HEDDEN.

"Supreme Court of United States, 1890. 137 U. S. 310, 11 Sup. Ct. 103, 34 L. Ed. 674.

In Error to the Circuit Court of the United States for the Southern District of New York.

Action to recover an alleged excess of duties, paid under protest.

BLATCHFORD, J. \* \* \* Section 2930 of the Revised Statutes, under which the principal question in the case arose, was as follows: "If the importer, owner, agent, or consignee of any merchandise shall be dissatisfied with the appraisement, and shall have complied with the foregoing requisitions, he may forthwith give notice to the collector, in writing, of such dissatisfaction, on the receipt of which the collector shall select one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same, agreeably to the foregoing provisions, and, if they shall disagree, the collector shall decide between them; and the appraisement thus determined shall be final, and be deemed to be the true value, and the duties shall be levied thereon accordingly." [At the trial, the plaintiffs put in evidence a number of regulations of the Treasury Department, among them the following: "Act. 474. Merchants' appraisements should not assume the nature of a judicial inquiry where judgment is rendered in accordance with the preponderance of testimony on either side, but should be conducted as an investigation of experts,

to ascertain whether the local appraiser has reported the true and proper market value of the merchandise in question." ] \* \* \*

They also offered in evidence sundry depositions of witnesses taken before the reappraisers in this case, in regard to market value, but they were excluded by the court on the objection of the defendant, and the plaintiffs excepted. They also offered to show by a witness the true and actual market value and wholesale price of the goods in question, and of goods identical with them, in the principal markets of the country from which they were exported, at the time of their exportation, in March, 1886; but, on the objection of the defendant that the testimony was immaterial, incompetent, and irrelevant, it was excluded, and the plaintiffs excepted. \* \* \* They also requested the court to submit all of the evidence to the jury touching the value upon which the duty was assessed, and the value declared on entry, on the ground that section 2930 of the Revised Statutes was unconstitutional; that the plaintiffs had the right to have submitted to the jury, under proper instructions, on the evidence, all questions touching the imposition of duty; and that, by withholding the evidence from the jury, by virtue of an unconstitutional statute which declared the conclusions of the reappraisers to be final, the plaintiffs were deprived of their constitutional right to a trial by jury, in a case where, by the common law, it obtained, under article 7 of the amendments of the Constitution. This request was denied, and the plaintiffs excepted.

It is provided, by section 2902 of the Revised Statutes, that it shall be the duty of the appraisers of the United States, "and every person who shall act as such appraiser," "by all reasonable ways and means in his or their power, to ascertain, estimate, and appraise the true and actual market value and wholesale price" of the merchandise under appraisal, "at the time of exportation, and in the principal markets of the country whence the same has been imported into the United States"; and, by section 2930, it is made the duty of the general appraiser and the merchant appraiser to examine and appraise the goods "agreeably to the foregoing provisions." \* \* \*

The views of the Circuit Court in regard to this case, as stated at the trial, are set forth in the report of it in 30 Fed. 360, and are contained also in the record. Mr. Robinson, the agent of the plaintiffs, employed to attend to their custom-house business, and who acted in the present case, gave his testimony as to what took place in regard to the reappraisement, so far as he was cognizant of it. The court commented on his testimony and that of other witnesses, and said: "I do not gather from the testimony, as given here, that the plaintiffs or their agent understood that they were in any way excluded from their goods, which were in the adjoining room. I understand him to say that when his appraisal was going on he was at perfect liberty to be in the room where the goods were, and point them out to the appraisers, but not to the witnesses. I understand him that there was a notice on the door that led into that room that nobody would be

allowed in there when the witnesses were examining the goods. When this case was up and the merchant appraiser and the general appraiser were there, if he had wanted to, he could have gone into the room, and pointed out any of the goods he had a mind to. He was asked to make his statement, and understood that he had the right. He didn't question but that the samples they had were the right ones. He stayed there as long as he wanted to, to do anything about pointing out his goods. I think the importer was entitled to that—to be there when the appraisal was made; to point out his goods; to know they were his goods; to illustrate them, and exhibit them in any manner he saw fit; and to present to the appraisers any views he had. I think he had that right; but I am not able to say from this evidence that there was anything tending to show that he was denied that right. There is one other point upon which I am not clear; that is when this board takes testimony (and, whether they will take it all or not, they are to decide themselves), whether they are bound to let the importer know that they are taking it; or, if they do let the importer know they have taken it, whether they are bound to let him know what it is, so he may answer it. But my impression is that that is discretionary with the board; that they may make inquiry by what they deem to be proper ways and means; and that the importer must rely on their fairness and judgment as to what testimony they do take, and the weight they give to it; that the fact that the importer was not informed who the witnesses were, and what they testified to, and given an opportunity to cross-examine them, and an opportunity to meet it, does not constitute a valid objection against the reappraisement."

The contention of the plaintiffs is that under the instructions of the treasury department, and the evidence, the question in issue as to the dutiable value of the merchandise could not be reasonably heard at all, on the reappraisement, because (1) the importer or his agent was practically excluded from the reappraisement; (2) was not afforded opportunity to support his oath on entry, or within proper limits to confront the opposing witnesses by testimony in his own behalf; (3) or to sift evidence secretly or openly heard in opposition to him; (4) or to have the aid of counsel, if he desired; and, particularly, that the rule of "reasonable ways and means" could not exist in a tribunal which proceeded to examine an issuable matter under a rule which excluded lawyers.

We are of opinion that, under the statute, the question of the dutiable value of the merchandise is not to be tried before the appraisers as if it were an issue in a suit in a judicial tribunal. Such is not the intention of the statute, and the practice has been to the contrary from the earliest history of the government. No government could collect its revenues or perform its necessary functions, if the system contended for by the plaintiffs were to prevail. The regulations prescribed in the instructions from the Treasury Department are reasonable and proper. By section 2949 of the Revised Statutes (U. S.



Comp. St. 1901, p. 1940) the Secretary of the Treasury has power to establish "rules and regulations not inconsistent with the laws of the United States, to secure a just, faithful, and impartial appraisement of all merchandise imported into the United States"; and by section 2652 (page 1821) it is made "the duty of all officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws; and, in case any difficulty shall arise as to the true construction or meaning of any part of the revenue laws, the decision of the Secretary of the Treasury" is made conclusive and binding. The proceedings for appraisal must necessarily be to some extent of a summary character. \* \* \*

Although by section 29 of the act of June 10, 1890, c. 407, entitled "An act to simplify the laws in relation to the collection of the revenues," sections 2902 and 2930 of the Revised Statutes are expressly repealed, section 10 of that act provides that it shall be the duty of the appraisers of the United States, "by all reasonable ways and means," to appraise the actual market value and wholesale price of imported goods in the principal markets of the country whence the same have been imported; and section 13 of that act provides that the decision of the appraiser or that of the general appraiser in cases of reappraisement, or that of the board of general appraisers on review, shall be final and conclusive as to the dutiable value of the merchandise, against all parties interested therein. There is nothing in the instructions of the Secretary of the Treasury, or in any of the regulations prescribed, or in the evidence in this case, which shows that the appraisers were not free to perform their duties properly, as required by the statute. The reappraisers appraised the goods in the appraisers' room in the public store. On the day before the reappraisement took place, the agent of the plaintiffs received due notice of it, and he attended and was called by the reappraisers before them. The merchant appraiser had then and there samples of the plaintiffs' goods, and the general appraiser asked the agent for his statement in the case, and it was made. The samples were on the table before the merchant appraiser, and the cases of goods were in the adjoining room. The agent made no objection as to the proceedings, and testifies that he was allowed to make a full statement concerning the value of the plaintiffs' goods; and the evidence fails to show that any request was made on behalf of the plaintiffs which was refused, except the request to find the value which the plaintiffs desired to be found. \* \* \* 11

<sup>11</sup> See rules regarding examination of immigrants, 125 Fed. 643.

## ORIGET v. HEDDEN.

Supreme Court of United States, 1894. 155 U. S. 228, 15 Sup. Ct. 92, 39 L. Ed. 130.

FULLER, C. J. \* \* \* 3. The contention that the importer has the right to be present throughout the proceedings on the reappraisement, hear or examine all the testimony, and cross-examine the witnesses, which was passed on in *Auffmordt v. Hedden*, 137 U. S. 310, 11 Sup. Ct. 103, 34 L. Ed. 674, is renewed in this case.

The importer appeared at the opening of the reappraisal, and made application that he or his associate, or his counsel might examine the various affidavits made by experts, importers, merchants, and others, be present at the taking of any testimony, and cross-examine all witnesses produced, or suggest questions to the general appraiser. The appraisers ruled that they could not accede to this request, but expressed their desire to hear the importers in regard to their reappraisements, and their assurance of appreciation of any suggestions the importers might make as to asking questions of the witnesses. The presumption in favor of official action sustains this ruling as being in accordance with the rules and regulations established by the Secretary of the Treasury, under section 2949 of the Revised Statutes (U. S. Comp. St. 1901, p. 1940), to secure a just, faithful, and impartial appraisal of all merchandise imported into the United States, and just and proper entries of the actual market value, or wholesale price thereof; and this was indeed the fact, as appears by reference to the general regulations of 1884, and instructions of June 9, 1885, given at length in *Auffmordt v. Hedden*.

The following quotation from the instructions of 1885 will suffice to explain the reasons for the rule: "The law provides that the merchant appraiser shall be familiar with the character and value of the goods in question, and it is presumed that the general appraiser will have or will acquire such expert knowledge of the goods he is to appraise as to enable him to intelligently perform his official duty with a due regard for the rights of all parties and independently of the testimony of interested witnesses. The functions of the reappraising board are the same as those of the original appraisers. They are themselves to appraise the goods, and not to depend for their information upon the appraisement of so-called experts in the line of goods in question. \* \* \* Appraisers are authorized to summon witnesses, but there is no authority for the public examination of such witnesses or their cross-examination by importers or counsel employed by such importers. The appraising officers are entitled to all information obtainable concerning the foreign market value of goods under consideration, but such information is not public property. It is due to merchants and others called to give such information that their statements shall be taken in the presence of official persons only. It must often occur that persons in possession of facts which would

be of value to the appraisers in determining market values are deterred from appearing or testifying by the publicity given to reappraisement proceedings."

As already stated, plaintiff in the case at bar was invited by the appraisers to present his views in regard to the reappraisement, and to suggest questions to be put to the witnesses. He did not avail himself of the opportunity, but insisted on the right to remain throughout the proceedings, to be informed as to all the evidence, and to cross-examine the witnesses as in open court. This, according to *Auffmordt v. Hedden* and *Passavant v. U. S.*, 148 U. S. 214, 13 Sup. Ct. 572, 37 L. Ed. 426, could not be conceded. In those cases it was ruled that under the revenue system of the United States the question of the dutiable value of imported articles is not to be tried before the appraisers, as if it were an issue in a suit in a judicial proceeding; that such is not the intention of the statutes; that the practice has been to the contrary from the earliest history of the government; and that the provisions of the statute in this behalf are open to no constitutional objection.

As respects taxation and assessment for local improvements, such notice and hearing as are appropriate to the nature of the case, and afford the opportunity to assert objections to the methods pursued or to the amount charged, are deemed sufficient for the protection of the individual. *Lent v. Tillson*, 140 U. S. 316, 327, 11 Sup. Ct. 825, 35 L. Ed. 419.

Duties imposed under tariff laws are paid in order that goods may be brought into the country, and provisions in respect of their levy and collection are framed in view of the character of the transaction. The finality of the appraisal is a condition attending the importation prescribed by the government as essential to the operation of the system; and, if the importer is afforded such notice and hearing as enables him to give his views and make his contention in respect of the value of his goods, he cannot complain. \* \* \*

Judgment affirmed.

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NOTE ACCOMPANYING COMMERCIAL AGREEMENT BETWEEN UNITED STATES AND GERMAN EMPIRE, April 22, 1907: "C. In reappraisement cases the hearing shall be open and in the presence of the importer or his attorney, unless the board of appraisers shall certify to the Secretary of the Treasury that the public interest will suffer thereby; but in the latter case the importer shall be furnished with a summary of the facts developed at the closed hearing upon which the reappraisement is based."



TARIFF ACT OF AUGUST 5, 1909, § 28, subsec. 13 (36 Stat. 99):  
“\* \* \* The general appraiser and boards of general appraisers shall proceed by all reasonable ways and means in their power to ascertain, estimate and determine the dutiable value of the imported merchandise and in doing so may exercise both judicial and inquisitorial functions. In such cases hearings may in the discretion of the general appraiser or board of general appraisers before whom the case is pending be open and in the presence of the importer or his attorney and any duly authorized representative of the government, who may in like discretion examine and cross-examine all witnesses produced.”

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TARIFF ACT OF OCTOBER 3, 1913, § III M (38 Stat. 186):  
“\* \* \* The general appraiser and boards of general appraisers shall proceed by all reasonable ways and means in their power to ascertain, estimate, and determine the dutiable value of the imported merchandise, and in so doing may exercise both judicial and inquisitorial functions. In such cases the general appraisers and the boards of general appraisers shall give reasonable notice to the importer and the proper representative of the government of the time and place of each and every hearing at which the parties or their attorneys shall have opportunity to introduce evidence and to hear and cross-examine the witnesses for the other party, and to inspect all samples and all documentary evidence or other papers offered.”

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TARIFF ACT, 1922 § 501.—REAPPRAISEMENT (42 Stat. 966; 19 USCA 381): “\* \* \* Every such appeal shall be transmitted with the entry and the accompanying papers by the collector to the board of general appraisers and shall be assigned to one of the general appraisers who shall ascertain and return the value of the merchandise and shall give reasonable notice to the importer and to the person designated to represent the government in such proceedings of the time and place of the hearing, at which the parties and their attorneys shall have an opportunity to introduce evidence and to hear and cross-examine the witnesses of the other party and to inspect all samples and all papers admitted or offered as evidence.”<sup>12</sup>

<sup>12</sup> Duty of Commissioner of Internal Revenue to disclose evidence, on appeal to Board of Tax Appeals, *Blair v. Oesterlein Machine Co.* (App. D. C.) 17 F.(2d) 663 (1927).

## SECTION 9.—HEALTH AND SAFETY—NUISANCES

## WAYE v. THOMPSON.

Supreme Court of Judicature, Queen's Bench Division, 1885. L. R. 15  
Q. B. Div. 342.

Case stated by justices under St. 20 & 21 Vict. c. 43, on the hearing at petty sessions of an information preferred by the appellant, an inspector of nuisances, against the respondent, a butcher, under St. 38 & 39 Vict. c. 55, § 117.<sup>13</sup>

Upon the hearing<sup>14</sup> the following facts were proved, viz.: That the meat was in the possession of and exposed for sale by the respondent, and was intended for the use of man; that it was seized by the appellant on the 21st of October, 1884, and on the same day taken before Thomas Barlow Mafsticks, Esq., a justice of the peace, and it appearing to him on an ex parte statement not on oath that such meat was diseased, unsound, unwholesome, and unfit for the food of man, he did thereby condemn the meat, and ordered the same to be destroyed or so disposed of to prevent the same from being exposed for sale or used for the food of man. On the following day, however, the said justice, at the request of the respondent, directed the appellant not to destroy the carcass of meat until the owner could have it inspected by a

<sup>13</sup> English Public Health Act, 1875, 38 Vict. c. 55:

"Sec. 116. Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any animal, carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged; and if any such animal, carcase, meat, poultry, game, flesh, fruit, vegetables, corn, bread, flour or milk appears to such medical officer or inspector to be diseased or unsound or unwholesome, or unfit for the food of man, he may seize and carry away the same himself or by an assistant, in order to have the same dealt with by a justice.

"Sec. 117. If it appears to the justice that any animal, carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk so seized is diseased or unsound or unwholesome or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding twenty pounds for every animal, carcase, or fish, or piece of meat, flesh, or fish, or any poultry or game, or for the parcel of fruit, vegetables, corn, bread, or flour, or for the milk so condemned, or at the discretion of the justice, without the infliction of a fine, to imprisonment for a term of not more than three months."

<sup>14</sup> It was stated by counsel during argument that a summons had issued against the respondent, calling on him to show cause why the penalty under section 117 should not be inflicted.

veterinary surgeon, which inspection was accordingly made by witnesses on respondent's behalf.

The appellant called witnesses to prove that the meat was diseased, unsound, unwholesome, and unfit for the food of man. The respondent thereupon proposed to call the witnesses who by the permission of the said justice had inspected the meat on his, the respondent's, behalf, and also other witnesses, some of whom had seen the cow before it was slaughtered and after it had been dressed, and others who had seen other portions of the carcass of the cow from which the alleged diseased meat had been cut, some before and others after the same had been condemned by the said justice (including medical and veterinary men) and other witnesses who alleged they had partaken of meat from the same animal. This testimony was objected to by the appellant on the following grounds:

(1) That the question of the meat being diseased, unsound, unwholesome, and unfit for the food of man had been already adjudicated upon and decided in the affirmative by a justice of the peace on an *ex parte* proceeding, evidence of which had been presented to the justices.

(2) The evidence to the contrary should not be admitted by the justices.

(3) That the evidence furnished to them by the appellant was sufficient to justify a conviction of the respondent under the 117th section of the Public Health Act, 1875, for the offences alleged against him.

The justices overruled the objections and heard the evidence of the defendant's witnesses, which satisfied the justices that the meat was not diseased, but was wholesome, sound, and fit for the food of man, and the justices gave their decision against the appellant, and ordered him to pay the respondent's costs.

The question upon which this case was stated for the opinion of the court was whether the justices should have permitted evidence to be given by the respondent as to the state and condition of the said meat at the time it was ordered to be destroyed by the said Thomas Barlow Mafsicks.

MANISTY, J. (after stating the facts as they appeared in the case). The information laid was no doubt the groundwork of a summons, and we are told that the practice is to issue a summons calling on the respondent to shew cause why he should not be sent to prison or fined. On the hearing of that matter—and not of the information as alleged in the case, which is imperfectly stated—the magistrates were called upon to decide whether or not the meat was fit for human food, and the question is whether they were justified in admitting the evidence as to the state of the meat.

The cases of *White v. Redfern*, 5 Q. B. D. 15, and *Vintner v. Hind*, 10 Q. B. D. 63, do not assist us. *White v. Redfern* decides that a justice may, without hearing evidence on behalf of the butcher, condemn the meat; but that does not help us in the present question, viz., when a man is in peril of being sent to prison or fined, is he to be



heard or not? It is contrary to first principles to say that a man can be sent to prison or convicted without being heard. (The respondent was not heard, and it was not necessary that he should be heard, when the case was before the magistrate in the first instance. That magistrate was satisfied that it was made to appear to him the meat was diseased and he condemned it. If the respondent is not allowed to give evidence when summoned to show cause why he should not be sent to prison or fined, he has not an opportunity of being heard at all, and it would be the first case I ever knew of a man being subject to imprisonment or fine, without having been heard. I am clearly of opinion that the magistrates were right in receiving the evidence.<sup>15</sup>

### CITY OF PHILADELPHIA v. SCOTT.

Supreme Court of Pennsylvania, 1876. 81 Pa. 80, 22 Am. Rep. 738.

AGNEW, C. J. \* \* \* The only question, therefore, remaining is whether the act has furnished a constitutional mode of proceeding, to bind the owner of the land to the payment of the expense of the repairs. The following are all its material provisions: "It shall be the duty of the commissioners \* \* \* upon complaint by any person owning property fronting upon such river, or liable to be damaged by the overflow of the same, that said banks, or any part thereof, are out of repair, or in an unsafe or insecure condition, to give notice forthwith to the owner or owners of such part or portion to repair the same within forty-eight hours after such notice, \* \* \* and in case such owner or owners shall neglect or refuse to cause such repairs to be made within the time aforesaid \* \* \* it shall be the duty of such commissioners to cause the said banks to be well and thoroughly repaired, etc., and they shall enter the same as a lien against the said premises and the owners thereof." The law then provides for a scire facias to enforce payment, and declares "that upon the trial of such action the said defendant shall only be permitted to aver and prove in defence that the lien, in whole or in part, has been paid since the same was filed, and that all matters necessary for a recovery on part of the plaintiffs shall be considered as proved by the production of the lien and scire facias thereon at the time of trial."

The law, it will be seen, provides no mode of determining the necessity for repair, not even the judgment of the commissioners, for they are bound, on complaint, forthwith to give notice, and the owner is bound, within forty-eight hours after notice, to make the repairs, and, on default, the commissioners shall do the work at his expense. Whether the bank actually needs repair, or the injury complained of, if any, is

<sup>15</sup> See *Cooper v. Wandsworth Board of Works*, 14 C. B. (N. S.) 180 (1863), post, p. 272.

See, also, *Vestry of St. John's v. Hutton*, [1897] 1 Q. B. 210.

a total destruction of the bank, demanding reconstruction, or a mere repair, which the owner is bound to do, is not to be ascertained before the liability is settled upon him. He is to pay at all events, and this case itself is evidence of the necessity of the provision to determine the nature of the thing complained of, for we have a finding of \$6,445.66 against the defendant, a sum which looks more like the price of reconstruction than of repair. Repair is all this law provides for. Perhaps some allowance might be made, and the clause requiring the commissioners "to cause the banks to be well and thoroughly repaired" might be interpreted as inferentially requiring an examination and decision upon the duty of repairing before they proceeded to do it. But we are met by the proviso, which forbids any defence but payment. There can be no inquiry into the fact whether the commissioners actually did determine it to be a case of necessary repair, whilst they may have gone on different grounds. An act which subjects a man to a penalty of over \$6,000 for not doing the work for which complaint was lodged should clearly devolve the duty of decision upon some impartial tribunal.

The case of *Kennedy v. Board of Health*, 2 Pa. 366, is not in point. There the twenty-seventh section of the act of 29th of January, 1818, grounds the right of the board to abate the nuisance in express words in the opinion of the board that the nuisance tends to endanger the health of the citizens. This is an essential prerequisite, and the citizen is absolutely entitled to the judgment of the board on this point. This feature is at the foundation of the decision. In that case the constitutional question was not raised. But here the learned judge below was of opinion that the act of 1848 does not furnish due process of law, within the protection of the ninth section of the Declaration of Rights, that no one shall be "deprived of his life, liberty or property unless by the judgment of his peers or the law of the land." In this view we concur. What is meant by the law of the land has been fully discussed in *Craig v. Kline*, 65 Pa. 413, and the cited authorities. I shall not enlarge upon it. Suffice it to say, the law must furnish some just form or mode in which the duty of the citizen shall be determined before he can be visited with a penalty for nonperformance of the alleged duty. The proceeding must be in its nature judicial, though it is not necessary it should be before one of the ordinary judicial tribunals of the state.

Judgment affirmed.

METROPOLITAN BOARD OF HEALTH v. HEISTER  
(two cases).HEISTER v. METROPOLITAN BOARD OF HEALTH  
(two cases).Court of Appeals of New York, 1868. 37 N. Y. 661.<sup>1</sup>

The above four cases were submitted to the General Term of the Supreme Court in the First Judicial District, by the parties, under the Code, for the purpose of procuring decisions upon questions that had arisen between them, and which are also involved in several other pending suits.

In case No. 1, the board claims to recover the penalty given by the statute against one who has violated its order. The defendant, when the order was made, was engaged as a butcher, in the business pursuit of "slaughtering cattle at his slaughterhouse, No. 95 Fourth street, in the city of New York, which said slaughterhouse was in the densely populated portions of said city, and was upon a paved street." The board of health, the plaintiff, on said day, as contemplated by the first subdivision of the fourteenth section of the metropolitan health law (Laws 1866, c. 14), "took and filed among its records what (the same being written evidence) the plaintiff regarded as sufficient proof to authorize its declaration that the same (the using of said slaughterhouse for said pursuit) was dangerous to health, and was also a public nuisance." Said proof "consisted of statements of competent persons, under oath, that said business endangered the health of the people of the vicinity, was offensive to their senses, and rendered their life uncomfortable, and of facts sustaining such statements." The board thereupon "ordered said business to be discontinued, and said nuisance to be abated," but directed that the order should not be executed till the same had been served on the defendant, and he had been afforded an opportunity to be heard. This order was duly served on the defendant, and it is admitted "that the defendant might have applied for, and have had, the opportunity and hearing contemplated in said section, but did not, at any time, apply for the same, but declined or omitted so to do; that the plaintiff waited more than three days, as provided by law, after such service, and before commencing the execution of said order." And thereafter a final order was in due course made by the board, which is set out at length. The police were directed to execute this order, "and the execution of the order was duly commenced"; and "all doings and proofs and order of said board in the premises appear among its archives, as the law provides." The submission to the court below was formally made by both parties. The defendant's theory was sustained, and judgment ordered in his favor, and an appeal has been taken to this court by the plaintiffs. \* \* \*

Case No. 4 arises on the same state of facts, and relates to the same order, as case No. 1; but it is a suit by the butcher against the board to obtain an injunction to prevent the board enforcing its order. forbid-



ding slaughtering at the place to which the order relates. The case differs from No. 1 only at the point where the plaintiff states his claims and demands his remedy. The board found the same facts as to the business being "dangerous to health," made the same order, and gave the plaintiff the same opportunity for a hearing, which he declined, as in case No. 1. It appears that the record of the decision and proceedings of the board are preserved among its records. The decision of the General Term, was in favor of Heister, and the board of health bring their appeal to this court.

HUNT, C. J. \* \* \* Before leaving the consideration of this constitutional objection, it ought, perhaps, to be observed that the act provides for notice to the party affected, before the judgment finally passes against him. In substance, the board, upon the evidence before it, determine that a prima facie case exists requiring their action. In the present instance, after such preliminary determination made, notice was given to Heister of what had been done, and that he could be heard upon the subject, with his witnesses, at a time designated. This gave the same protection to all his rights as if notice had been served upon him before any preliminary proceedings had been taken. He refuses to litigate before the board the question whether his pursuit is dangerous to the public health, but places himself upon their want of power over the subject. He cannot complain now that their judgment upon the facts is to be held conclusive upon him.

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PEOPLE ex rel. COPCUTT v. BOARD OF HEALTH OF CITY OF YONKERS.

Court of Appeals of New York, 1893. 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522.

Appeal from Supreme Court, General Term, Second Department.

Certiorari by the People of the State of New York on the relation of John Copcutt to review the action of the Board of Health of the City of Yonkers in enacting an ordinance declaring certain mill ponds owned by relator in such city to be public nuisances, and directing the issuance of a warrant authorizing the proper officer to remove and abate the same. From a judgment of the General Term (71 Hun, 84, 24 N. Y. Supp. 629) affirming the proceedings of the board, relator appeals. Affirmed.

The other facts fully appear in the following statement by EARL, J.:

The Nepperhan river is a small stream of water flowing through the city of Yonkers, and across the stream there were several dams, to furnish power to drive machinery. Much complaint having been made to the board of health that these dams created nuisances, the members of the board resolved to hold a meeting on the 27th day of March last to consider the condition of the dams, and they ordered notice to be given to the owners of the dams to show cause at that

time why the dams should not be removed. In pursuance of this resolution, notice was served upon the relator, who owned or was interested in two of the dams and the ponds and water powers thereby created, called the "5th" and "6th" water powers, and he appeared before the board at the time and place in person and by counsel, and he gave evidence tending to show that the two dams were not nuisances, and did not create nuisances; and there was also evidence in conflict with the case made by him. After hearing the evidence, the board made its determination that the dams were nuisances, and ordered them removed. The relator then instituted this proceeding by certiorari to review this determination. The board made return to the writ, setting forth all its proceedings and the evidence taken by it, and stated in its return that its determination and action were based "not only upon testimony given by the witnesses, but that the determination of the said board of health, and the members thereof, has been based mainly upon the individual knowledge and experience of the members of said board of health concerning the ponds in the Nepperhan stream, and the condition thereof, inasmuch as each member of the board of health, in performance of the duties imposed by law, has personally inspected and has examined and inquired into the condition of said ponds and of said stream, and that the conclusions reached by this board have been reached and depend largely upon personal knowledge and experience of the individual members of this board, and for this reason it is apparent that this board cannot certify to and reproduce before this court all of the proofs, nor all of the grounds of the determination of said board, nor any considerable part thereof." Upon the return and the papers filed therewith the general term affirmed the action of the board, and then the relator appealed to this court.

EARL, J. (after stating the facts). The disposition of this case turns largely upon the effect and the construction of the statutes constituting the board of health, and defining its powers and duties, and we will therefore first give attention to the statutes. -

By chapter 184 of the Laws of 1881 (an act to revise the charter of the city of Yonkers) it is provided in title 9 that the mayor, the supervisor, the president of the common council, the president of the board of water commissioners, the president of the board of police, and the health officer shall constitute the board of health of the city; and the board is given power, among other things, "to suppress, abate, and remove any public nuisance detrimental to the public health," and, in addition to other remedies which it may possess by law, it is empowered to issue its warrant, whenever necessary, to the sheriff of the county of Westchester, or to any policeman of the city, authorizing and commanding him to forthwith suppress, abate, and remove such public nuisance, at the expense of the lot whereon the nuisance exists, and of the owner thereof, to be enforced and collected as in the act provided. It is further provided that, in addition to the powers expressly granted in the act, the board shall "have and exercise all the powers now or at any time hereafter conferred upon boards of health in cities by any general law;" and it is authorized to make ordinances;

rules, and regulations to carry into effect its powers, and to enforce observance of them by penalties, and by action instituted in its name to recover penalties and to restrain and abate the nuisance.

By chapter 270 of the Laws of 1885 (the general act for the preservation of the public health) it is provided that the board of health in any city of the state, except the cities of New York, Brooklyn, and Buffalo, shall have the power, and it shall be its duty, "to receive and examine into the nature of complaints made by any of the inhabitants concerning nuisances or causes of danger or injury to life and health within the limits of its jurisdiction; to enter upon or within any place or premises where nuisances or conditions dangerous to life and health are known or believed to exist, and by appointed members or persons to inspect and examine the same, and all owners, agents and occupants shall permit such sanitary examinations, and said board of health shall furnish said owners, agents and occupants a written statement of results or conclusions of such examinations; and every such board of health shall have power, and it shall be its duty, to order the suppression and removal of nuisances and conditions detrimental to life and health found to exist within the limits of its jurisdiction," and "to make, without the publication thereof, such orders and regulations in special and individual cases, not of general application, as it may see fit, concerning the suppression and removal of nuisances." It is further authorized to abate nuisances, and to impose penalties for the violation of its orders and regulations, and the violation of them is also made a misdemeanor, and it may commence actions to restrain and abate nuisances, and to enforce its orders and regulations.

A careful examination of the two acts shows that there is no provision for a hearing before the board on the part of any person who is charged with maintaining a nuisance upon his premises. The right to such a hearing is not expressly given, and cannot be implied from any language found in either act, or from the nature of the subjects dealt with in the acts. Boards of health and other like boards act summarily, and it has not been usual anywhere to require them to give a hearing to any person before they can exercise their jurisdiction for the public welfare. The public health might suffer or be imperiled if their action could be delayed until a protracted hearing could be brought to a termination. There is no provision in the acts for calling or swearing witnesses, and there is no general law giving them power to do so. Section 843 of the Code of Civil Procedure<sup>16</sup> is not applicable to such a case, for the reason that the board is not authorized by law to hear testimony or take the oral examination of witnesses.

The question may be asked, how can these provisions conferring powers upon boards of health to interfere with and destroy property, and to impose penalties and create crimes, stand with the Constitution, securing to every person due process of law before his property or personal rights or liberty can be interfered with? The answer must

<sup>16</sup> Authorizing the administration of oaths by certain officials.



be that they could not stand if we were obliged to hold that the acts referred to made the determinations of the board of health as to the existence of nuisances final and conclusive upon the owners of the premises where they are alleged to exist. (Before such a final and conclusive determination could be made, resulting in the destruction of property, the imposition of penalties and criminal punishments, the party proceeded against must have a hearing, not as matter of favor, but as matter of right; and the right to a hearing must be found in the acts.) *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 239. As we have said, there is no provision of law giving any party a right to a judicial hearing before these boards, and there is no provision making their determination final. If the decisions of these boards were final and conclusive, even after a hearing, the citizen would in many cases hold his property subject to the judgments of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated, and generally unfitted to discharge grave judicial functions. Boards of health, under the acts referred to, cannot, as to any existing state of facts, by their determination make that a nuisance which is not in fact a nuisance. They have no jurisdiction to make any order or ordinance abating an alleged nuisance unless there be in fact a nuisance. It is the actual existence of a nuisance which gives them jurisdiction to act. Their acts declaring nuisances may be presumptively valid until questioned or assailed, for the same reasons which give presumptive legality to the acts of official persons under the maxim, "omnia præsuntur legitime facta donec probetur in contrarium."

What operation, then, does the order or ordinance of the board of health have under these acts? The nuisance actually existing, and the jurisdiction having been regularly exercised, the order or ordinance has all the operation and effect provided in the act, and the persons who abate the nuisance have the protection which they would not have as private persons abating, not a private nuisance, especially injurious to them, but a public nuisance injurious to the general public. It may be said that if the determination of a board of health as to a nuisance be not final and conclusive, then the members of the board, and all persons acting under their authority in abating the alleged nuisance, act at their peril; and so they do, and no other view of the law would give adequate protection to private rights. They should not destroy property, as a nuisance unless they know it to be such, and, if there be doubt whether it be a nuisance or not, the board should proceed by action to restrain or abate the nuisance, and thus have the protection of a judgment for what it may do.

It may further be asked, what, under this view of the law, is the remedy of the owner of property threatened with destruction or actually destroyed as a nuisance? He may have his action in equity to restrain the destruction of his property if the case be one where a court of equity under equitable rules has jurisdiction,<sup>17</sup> or he may bring a

<sup>17</sup> See *Golden v. Department of Health*, 21 App. Div. 420, 47 N. Y. Supp. 623 (1897).

common-law action against all the persons engaged in the abatement of the nuisance to recover his damages, and thus he will have due process of law; and, if he can show that the alleged nuisance does not in fact exist, he will recover judgment, notwithstanding the ordinance of the board of health. Thus the views we take of these acts and similar acts conferring powers upon local officers to proceed summarily upon their own view and examination furnish adequate protection to boards of health, to the public, and to property owners, and, while these views are not supported by all the decided cases upon the subject, they have the support of the best reasons and of ample authority.

In Cooley's Constitutional Limitations (5th Ed.) at page 722, in a note, the learned author, speaking of boards of health, says: "Though they cannot be vested with authority to decide finally upon one's right to property, where they proceed to interfere with it as constituting a danger to health, yet they are vested with quasi judicial power to decide upon what constitutes a nuisance, and all presumptions favor their actions." And again, at page 742, in a note, citing authorities, he says: "Whether any particular thing or act is or is not permitted by the law of the state must always be a judicial question, and therefore the question what is and what is not a public nuisance must be judicial, and it is not competent to delegate it to local legislative or administrative boards. The local declaration that a nuisance exists is, therefore, not conclusive, and the party concerned may contest the fact in the courts."

Dillon, in his work on Municipal Corporations (4th Ed.) § 374, says the authority to prevent and abate nuisances and its summary exercise "may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal nature of a nuisance; but such power conferred in general terms cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which in its nature, situation, or use is not such."

In Wood's Law of Nuisances (section 740) it is said that, where the public authorities abate a nuisance under authority of a city ordinance, "they are subject to the same perils and liabilities as an individual if the thing abated is not in fact a nuisance. \* \* \* It would, indeed, be a dangerous power to repose in municipal corporations to permit them to declare by ordinance or otherwise anything a nuisance which the caprice or interests of those having control of its government might see fit to outlaw, without being responsible for all the consequences; and, even if such power is expressly given by the Legislature, it is utterly inoperative and void, unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance, and in defiance of it."

In *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984, Mr. Justice Miller said: "It is a doctrine not to be tolerated in this country that a municipal corporation without any general laws, either of the city or the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal

by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city at the uncontrolled will of the temporary local authorities."

In *Hutton v. City of Camden*, 39 N. J. Law, 122, 23 Am. Rep. 203, it was held that the action of the board of health could not determine conclusively that a nuisance exists, and that such a conclusive determination could be made only in a regular course of law before an established court of law or equity.

In *Underwood v. Green*, 42 N. Y. 140, the action was to recover the value of dead hogs removed under the direction of the city sanitary inspector, an officer clothed with judicial discretion, and acting under a city ordinance declaring that all dead animals "be forthwith removed and disposed of by removal beyond the limits of the city or otherwise, so as most effectually to secure the public health"; and it was held that it must be shown, in order to justify the act, that the dead hogs were or would become in some way dangerous or deleterious to public health.

The following are also instructive authorities upon the same subject: *Mayor, etc., of New York v. Board of Health*, 31 How. Prac. 385; *Clark v. Mayor, etc.*, 13 Barb. 32; *Rogers v. Barker*, 31 Barb. 447; *Coe v. Schultz*, 47 Barb. 64; *Lawton v. Steele*, 119 N. Y. 226, 23 N. E. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813.

The result of these authorities is that whoever abates an alleged nuisance, and thus destroys or injures private property, or interferes with private rights, whether he be a public officer or private person, unless he acts under the judgment or order of a court having jurisdiction, does it at his peril; and when his act is challenged in the regular judicial tribunals it must appear that the thing abated was in fact a nuisance. This rule has the sanction of public policy, and is founded upon fundamental constitutional principles.

The way is now clear to the disposition of this case. The board of health did act, and had a right to act, upon its own inspection and knowledge of the alleged nuisance. It was not obliged to hear any party. It could obtain its information from any source and in any way, and hence its determination upon the question of nuisance is not reviewable by certiorari. *People v. McCarthy*, 102 N. Y. 630, 8 N. E. 85. \* \* \*

Our conclusion, therefore, is that the judgment of the general term should be affirmed, with costs. All concur.<sup>18</sup>

<sup>18</sup> *Finch, J.*, in *Board of Health of City of Yonkers v. Copcutt*, 140 N. Y. 12, 35 N. E. 443, 23 L. R. A. 485 (1893), an action to recover a penalty for a violation of an ordinance of the board of health, said:

"The appellant also objects that the ordinance, which was directed against him specially, and affected his property rights, was invalid, because passed without notice to him and an opportunity to be heard. In another phase of this case, coming to us on certiorari for a review of the action of the board, we have decided that a hearing was not necessary, because the question of nuisance, or not, lies at the foundation of the jurisdiction, and the party proceeded against may always try that vital and decisive question in



## NOTE.

In the case of Health Department of City of New York v. Rector, etc., of Trinity Church, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579 (1895), the statute provided that all tenement houses should be furnished with a sufficient supply of water on each floor by the owners "whenever they shall be directed so to do by the board of health." An order issued under this statute was contested for want of provision for notice. The court, in sustaining the validity of the act, points out that penalties for alleged noncompliance cannot be enforced without a trial, and that upon such trial the defendant may show that the house in question is not a tenement house within the provision of the act, or that there was a supply of water as provided for by the act. As originally printed (see 39 N. E. on page 838), the opinion read: "to show, in other words, that he did not violate the statute, or the order of the board;" the opinion in the official report (see 145 N. Y. on page 46) adds: "or that the statute itself or the order was unreasonable and illegal." The addition brings the case within the principle of the Yonkers Board of Health Case.

In sustaining, irrespective of notice and hearing, an improvement order, the Supreme Court of Massachusetts, in Salem v. Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650 (1868), laid down the doctrine, that notice should not be essential to the right of a board of health to act for the public safety; that delay might defeat all beneficial results, and that there are many cases in which powers of a quasi judicial character, must be exercised, finally and conclusively, without a hearing. The court distinguishes between the adjudication, in so far as it operates merely in rem, and in so far as it is the foundation of ulterior proceedings in personam. When it is sought to impose any liability upon owners, they may deny the validity of the adjudication; but those employed to carry the order into effect may safely rely upon its validity for their defense. The latter part of this remark is declared to have been obiter, and virtually overruled, in Miller v. Horton, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850 (1891).

In Commonwealth v. Sisson, 189 Mass. 247, 75 N. E. 619, 1 L. R. A. (N. S.) 752, 109 Am. St. Rep. 630 (1905), notice and hearing was held not to be necessary to the validity of an order of the fish and game commissioners, which, after determining that fish in a brook were of sufficient value to warrant the prohibition of the discharge of sawdust in it, and that the discharge of sawdust from the defendants' mill into the brook materially injured the fish therein, directed the defendants (1) to erect a blower or take other means approved by the commissioners to prevent the discharge of sawdust from the mill into the brook, and (2) not to accumulate a pile of sawdust on the bank of the brook, so that it may be liable to fall into the stream or be swept away by a rise of water. The court held the action of the fish commissioners unquestionably legislative in character, although not a general regulation. "The delegation of such legislative powers to a board is going a great way. But the remedy is by application to the Legislature, if a remedy should be given." The remedy was given by St. 1910, c. 460, providing for notice and hearing. Note that the order was discussed, throughout the case, as if it had been simply an order not to discharge sawdust into the brook.

the courts, and is not foreclosed by the order made. This case well illustrates the doctrine in actual operation. The plaintiff did not rely on its orders or ordinances alone, or the presumptions which they raised, but proceeded to allege and prove that the dam and pond were a public nuisance. The defendant took issue upon that, and the battle was fought out over that question. The defendant has had his day in court, ample and abundant chance to be heard, better and more complete than any hearing which the board could give. But we have already decided the question adversely to the defendant's contention, and nothing needs to be added to the discussion which it has received."

See Harrington v. Board of Aldermen of Providence, 20 R. I. 233, 38 Atl. 1, 38 L. R. A. 305 (1897); Hartman v. Wilmington, 1 Marv. (Del.) 215, 41 Atl. 74 (1894).

After an order has been made, notice must be given to the person affected with it, before he can be charged with its violation. State v. Butts, 3 S. D. 577, 54 N. W. 603, 19 L. R. A. 725 (1893).

## 44 REYNOLDS v. SCHULTZ.

Superior Court of City of New York, 1867. 27 N. Y. Super. Ct. 282.

ROBERTSON, C. J. \* \* \* The statute<sup>19</sup> requires the execution of the order to be suspended on demand of the party notified, and a hearing to be given him upon a fair and reasonable opportunity therefor, when he is to be allowed to give such proofs as he has to offer, and the board may also introduce new proofs. Upon such hearing they may modify or rescind such order in an action at law. The board were then required to "cause the facts in regard to such complaint to be investigated and the appropriate remedy applied." This resembles greatly the trial and decision of issues in an action. If private individuals failed to call to their notice peccant employments, premises or substances, such board had a staff of accusers, consisting of ten medical inspectors, to report twice a week on such facts as had come to their knowledge relative to the purposes of such act. So that abundant means were provided for obtaining the sufficient proof which the board were to take, without leaving their office, or uttering a word themselves, of accusation. I cannot come to any other conclusion than that such a mode of accusation, or obtaining evidence in advance, with such opportunity of being heard with evidence, and such a mode of final determination, was an exercise of judicial powers, and binding, unless prevented by some positive constitutional prohibition. If the compulsory attendance of witnesses for the accused, if necessary, be required to make the proceedings judicial, the board would probably be bound to give him the aid of the power they possess under the twenty-fourth section of the statute, to procure testimony. But in this case there is no pretense that any testimony has been lost by that means. If it had been set up, possibly this court might have exercised an equitable jurisdiction in obtaining such testimony, and perhaps also have thereby acquired jurisdiction over the whole subject. In order to enable such board to obtain proof sufficient for them to act upon, there was no necessity of their becoming active in hunting up testimony. The twenty-first section of the act requires them to keep a book open for public inspection, in which complaints of a sanitary character are to be recorded, signed by the accuser with his name, in which is to be entered the name of the accused, the date and the remedy suggested. This is not very unlike a complaint. \* \* \*

The main objections to the constitutionality of the exercise of power under such first subdivision are that such proceedings violate "the laws of the land" required to be observed by the second section of the article of the Constitution of this state, and are not "due process of law" under the sixth section of the same article. The special

<sup>19</sup> For provisions of statute in question, Laws N. Y. 1866, c. 74, see *Metropolitan Board of Health v. Heister*, ante, p. 142.

points in which they are supposed to deviate therefrom are six in number, as follows:

(1) That the functions of accuser and judge are blended in the same body.

(2) That no process is served, or notice of the proceedings given to parties interested.

(3) That the judgment precedes the trial.

(4) That the accused is not confronted with witnesses against him.

(5) That the testimony is not under oath, nor the ordinary rules of evidence observed.

(6) That no means are afforded to the accused to compel the attendance of witnesses.

The remarks already made dispose of the first and last of these objections. Indeed, I am not aware that there is any warrant for assuming that there must be a public prosecutor, except in cases in which the Constitution requires the presentment of a grand jury in order to make a conviction legal. Prosecuting officers are the creatures of statutes, and, however expedient, are not indispensably necessary to procure the punishment of offenders. The people of the state are the accusers and "actors" in all cases of public offenses.<sup>2</sup>

The second and third of such objections are inapplicable to the case of an order, made absolute by the default of a party notified to move to set it aside after notice, or confirmed after a hearing upon evidence on both sides. Indeed, they are founded upon the mistaken notion that the first order is the final adjudication, instead of being a conditional order, made absolute only after a hearing, or neglect to appear after notice and demand of such hearing. The seizure of chattels in an action of claim and delivery, or the issuing of a preliminary injunction order, attachment or order of arrest, would be equally subject to such an objection.

As to being confronted with witnesses, if that applies to the hearing, the board are bound to allow it, if their proceeding would otherwise be unconstitutional, and any irregularity in that respect could be corrected on certiorari. If oaths are necessary to be administered to witnesses, the same rule would prevail.<sup>20</sup> Although I am not prepared to say that an adjuration of a witness, the form of which may be varied by law, and is allowed according to the conscience of the party sworn, including the simple affirmation of a member of the Society of Friends, is a constitutional requisition to make a trial valid.

<sup>20</sup> *Groenvelt v. Burwell*, 1 *Ld. Raym.* 454, 472 (1699): "And by Holt, Chief Justice, where judicial power is given to persons by statute, they may by consequence of law administer an oath; but to that, he said, he would not give a positive opinion."

*People ex rel. Kasschau v. Board of Police Commissioners*, 155 *N. Y.* 40, 49 *N. E.* 257 (1898): "The relator was not subject to removal, except for some legal cause, to be ascertained and adjudged as a matter of fact upon a hearing. This contemplates a judicial investigation, in which there must, at least, be some legal responsibility for perjury, or some protection to the accused against falsehood."



In regard to the attendance of witnesses, what I have already said as to that cause of complaint will suffice. And I am inclined to think that it will be found, on examination, that a power to compel the attendance of witnesses for the accused will not be found to be part of "the law of the land," at least that mentioned in "Magna Charta," and was given in more recent times.

There still remains an objection to be considered, to wit, that no trial by jury is allowed under such statute. The words of the Constitution upon that point are (article 1, § 2) that "the trial by jury in all cases, in which it has been heretofore used, shall remain inviolate forever." (The term "case," in such provision, has been held to mean the kind of action, prosecution or proceeding, and is not confined to the subject-matter.) Thus, in the case of *Duffy v. People*, 6 Hill, 75, it was held that a proceeding to compel a husband to support his wife, being a mere preventive proceeding, like giving security to keep the peace, did not require a trial by jury, and that, preventive remedies for similar offenses having been used before the adoption of the Constitution, obtaining them was not a "case" within the meaning of the Constitution in which trials by jury had been used, although it was held that the adjudication of the magistrate on the subject of the marriage of the parties, although sufficient to compel giving security, was not conclusive. But although the judgment for the abatement of a nuisance at common law, "*quod permittat prosternere*," may have required a trial by jury, when demanded, yet courts of equity could always restrain the conducting of any business which was one, without such jury. And that is all which the order, as finally modified in this case, does. Such objection, therefore, falls to the ground. \* \* \*

### 13 REX v. LOCAL GOVERNMENT BOARD.

Ex parte ARLIDGE.

Court of Appeal, King's Bench Division. [1914] 1 K. B. 160.

Appeal from a decision of a Divisional Court ([1913] 1 K. B. 463) discharging a rule nisi for a certiorari directed to the Local Government Board in the following circumstances:

The mayor, aldermen, and councillors of the metropolitan borough of Hampstead, being a local authority within the meaning of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), and the Housing, Town Planning, etc., Act, 1909 (9 Edw. VII, c. 44), made an order called a closing order, under section 17, subsec. 2, of the later act, prohibiting the use for human habitation of a certain dwelling house, No. 83 Palmerston Road. One William Arlidge was the assignee of a lease of the dwelling house and the owner thereof within the meaning of the Act. He subsequently applied to the borough council to de-

termine the closing order under section 17, subsec. 6, of the same act. The borough council having refused this application, William Arlidge appealed under the same section to the Local Government Board, who by an order dated February 26, 1912, made under the seal of the office, signed by the president, and countersigned by a secretary, confirmed the refusal of the borough council to determine the closing order. The rule nisi was obtained on the application of William Arlidge to remove this order into the High Court for the purpose of having it quashed.

The ground on which the rule was moved was that the Local Government Board had not determined the appeal in manner provided by law.

From the affidavit of William Arlidge, the applicant, in support of the rule, the following facts appeared:

On January 12, 1911, the Hampstead Borough Council, under section 17, subsec. 2, of the Housing, Town Planning, etc., Act, 1909, made a closing order prohibiting the use of the dwelling house for human habitation until in their judgment it was rendered fit for that purpose.

On March 7, 1911, the applicant gave notice of appeal against the closing order to the Local Government Board under section 17, subsec. 3, of the act. The Local Government Board replied by letter that they were not prepared to decide this appeal without having first held a public local inquiry.

On May 24, 1911, a public local inquiry into the subject-matter of the appeal was held by an inspector appointed by the Local Government Board. The applicant, having already put the Local Government Board in possession of all the information in his power, did not attend this public inquiry.

On May 23, the applicant through his solicitors wrote to the Local Government Board expressing the hope that after the inquiry was held he would be allowed the opportunity of appearing and stating his case before the authority by whom the matter was to be dealt with. This request was repeated in a letter of June 13, 1911. The Local Government Board acknowledged the receipt of these letters, but did not accede to the request.

On July 29, 1911, the Local Government Board, without giving any information as to the nature or contents of the report of their inspector or allowing the applicant any further opportunity of being heard before the Local Government Board or the authority by whom the appeal was to be actually decided, made an order confirming the closing order and ordering the applicant to pay costs. An application was then made to the Local Government Board to state a special case under section 39, subsec. 1 (a), of the Act of 1909, but the Board refused to do this.

On July 10, 1911, the applicant had applied to the Hampstead Borough Council to determine the closing order under section 17, subsec. 6, of the Act of 1909. In answer to this application, after certain immaterial correspondence had passed, a notice dated November 2, 1911,

was served upon the applicant to the effect that the borough council refused to determine the closing order. On November 15 the applicant gave notice of appeal against this refusal.

On November 25 the applicant received notice from the Local Government Board to the effect that the Board proposed to direct a public local inquiry into the matter of this appeal and that notice of the date of the inquiry would be given to him; the notice further drew attention to the Rules as to appeals to the Board under Part I of the Act of 1909 and requested the applicant to furnish the Board with the original documents of refusal to determine the closing order. The applicant replied protesting against the inquiry, which was, nevertheless, held on December 8, the applicant being represented thereat by his solicitor. No information was given as to the nature or contents of the report of the inspector before whom this second inquiry was held, and the applicant was not allowed an opportunity of being heard before the Local Government Board or the authority by whom the appeal was actually to be decided. On February 26, 1912, the Local Government Board made the order signed and sealed as above mentioned confirming the refusal of the borough council to determine the closing order and ordering the applicant to pay costs.

The applicant further stated in his affidavit that it was the practice of the Local Government Board to consider as confidential the reports made in such cases by their inspectors after the holding of a public local inquiry and to refuse to disclose to the appellant the nature and contents thereof.

A rule nisi having been granted, the following evidence was filed on behalf of the Local Government Board:

An affidavit of Edward Leonard, the Local Government Board inspector, who held the inquiries on May 24 and December 8, 1911, respectively, stated that before the first inquiry was held notice thereof was given to the applicant's solicitors and public notice thereof duly posted stating that the inspector would be prepared to receive the evidence of any persons interested in the matter of the appeal. The applicant's solicitor was present during part of the inquiry, but took no part in the proceedings. The inspector stated publicly that after hearing witnesses for the applicant and the borough council he would be prepared to hear the evidence of any persons who could satisfy him that they were interested in the appeal. He called upon the applicant to state the grounds of his appeal. There was no answer, but the town clerk of Hampstead stated that he had received a letter from the applicant's solicitors to the effect that the applicant did not intend to take any part in the proceedings. After hearing all the witnesses who desired to give evidence the inspector stated publicly that he proposed to inspect the premises forthwith and invited both parties to the appeal to accompany him. Being unable to get access to the premises on May 24, the inspector on May 31 served notices on the applicant and on the occupier of the premises that he intended to enter them on June 2



for the purpose of survey and examination. On that date he inspected the premises in the presence of the applicant and others. On May 27, the inspector made his report and submitted the evidence and report to the Local Government Board. On June 5 he submitted his report of his inspection of the premises.

Before the second inquiry notices were served and posted as on the first inquiry. The applicant was present with his solicitor and witnesses. The inspector heard all the witnesses called for the applicant, including the applicant himself. After hearing all the witnesses and the arguments on behalf of the applicant by his solicitor, the inspector went to the premises accompanied by the applicant and others and carefully inspected the premises. He stated that he carefully considered the evidence as to the condition of the premises with the facts observed by him at the inspection, and, as a result of such consideration, on December 13, 1911, he made a full report to the Local Government Board, submitting with it a transcript of the shorthand note taken by agreement of the evidence given at the inquiry.

An affidavit of Sir Horace Cecil Monro, K. C. B., permanent secretary to the Local Government Board, contained the following statements:

"Par. 2. The order of the Local Government Board dated February 26, 1912, was made after a full and careful consideration of the reports made by their inspector, Edward Leonard, and the evidence and documents which accompanied those reports. A large number of observations and objections put forward on Mr. Arlidge's behalf by his solicitors were also considered, and before a final decision was come to Mr. Arlidge was invited by letter dated January 8, 1912, and addressed to his solicitors to place before the Board for their consideration any further statement which he might desire them to consider with reference to the subject-matter of his appeal before the making of the order. \* \* \*

"Par. 4. \* \* \* The Board also received from the town clerk of Hampstead \* \* \* a copy of the representation of the borough medical officer. \* \* \*

"Par. 16. A shorthand note of the proceedings and evidence at the inquiry together with his report were submitted to the Board by their inspector, and were duly considered, and on the 8th day of January, 1912, a letter was written to Mr. Arlidge's solicitors pointing out that the Board would taken into consideration the whole of the circumstances, and stating that the Board would be willing to consider any further statement which Mr. Arlidge might desire to submit to them with reference to the subject-matter of his appeal. This is the letter referred to in paragraph 2 hereof. \* \* \*

"Par. 19. On the 9th day of February, 1912, the said solicitors wrote to the Board complaining of the delay in giving their decision. No suggestion was made, either in this or in the earlier letters, that

Mr. Arlidge desired to bring to the notice of the Board any further facts, beyond what transpired at the inquiry.

"Par. 20. After careful and impartial consideration of the facts and the evidence given at the said inquiry and the report of their inspector, an order was made on the 26th February, 1912, under the seal of the Board, signed by the President, and countersigned by an assistant secretary, confirming the said refusal of the borough council to determine the said closing order.

"Par. 21. As indicated in their letter of the 8th January, 1912, any further statement of facts, had Mr. Arlidge desired to submit the same, would have been duly and fully considered, but it is submitted that in the absence of such statement the Board were bound to decide upon the facts then before them, and that the said appeal has been heard and determined according to law.

"Par. 22. The said appeal has been determined judicially upon the report of the inspector and the evidence taken by him (though without any further hearing of the appellant save at the said inquiry) in the same manner in all respects as other appeals to the Board have been accustomed to be determined under the various statutes prior to the Housing, Town Planning, etc., Act, 1909, which have given appeals to the Board, and it is submitted that no other form of procedure than that adopted by the Board in this case was intended or required by the said Housing, Town Planning, etc., Act, 1909."

The Divisional Court (Ridley, Lord Coleridge, and Bankes, JJ.) discharged the rule.

The applicant appealed.

The appeal was heard on July 24, 25, 26, and 28, 1913.

WILLIAMS, L. J. \* \* \* I do not find in the Act of 1909 any provision dealing with the disclosure or the nondisclosure of reports dealing with the facts or law laid before the Local Government Board by the inspector who presided at the public meeting or any other officer exercising a nonjudicial function for the purpose of consideration by the Local Government Board in arriving at their decision. Nor do I find anything of the sort in the rules determined under section 39. The act and rules, except for provisions (a) and (b), are silent as to procedure. No one has argued that, where the rules are silent, the procedure to be adopted on an appeal to the Local Government Board must be that of a common-law court. What was argued was, that on an appeal to the Local Government Board, at all events when not sanctioned by act or rule expressly, or by constructive implication, the procedure must not be contrary to natural justice. There is certainly nothing express in the Act or Rules to authorize the nondisclosure to the appellant or respondent who asks for production of documents submitted to the Local Government Board for consideration when making their decision, and taken into consideration by them. It is one thing to depart from the procedure adopted at common law, and another, and a very different thing, to adopt a procedure which is in-

consistent with the principles of natural justice on which the English common law is based. In my opinion the nonproduction of these reports is contrary to the principles of natural justice on which English law is based. The fact that the Housing, Town Planning, etc., Act, 1909, is an act passed to carry out a most useful reform, avoiding expensive litigation in certain local matters which in the interests of the public ought to be disposed of promptly by transferring jurisdiction from the law courts and vesting it in the Local Government Board (a department of the state), does not, in my opinion, justify a construction of the act which, by mere and unnecessary implication, authorizes a manifest departure from the principles upon which the English common law is based. It was said in argument that there was nothing in the affidavit on which the appellant obtained the rule nisi, or on which he relied in argument, to shew that there was anything in the documents not disclosed which told against the appellant's case in fact or in law; but surely it was for those who had to shew cause to lay before the Court of King's Bench proof that the documents presented to the Board, the contents of which were not disclosed to the appellant, were innocent or were immaterial. I wish to say here, as part of my judgment, that as a fact in this case the Local Government Board, through their secretary, Sir Horace Monro, thought fit to set forth the facts of the case in an affidavit. They may or may not—I have not to decide that—have been under an obligation to set forth those facts; but, having purported to set forth those facts, in my opinion the affidavit should have stated them fully, and omitted nothing.

The nonproduction of these documents was justified by the Local Government Board on the ground that reports, whether of fact or law, made by officers of the Board, were, according to a well-established practice of the Board, both under this Act and prior acts, treated as confidential. I invited the Solicitor General to produce these documents for inspection by the court, but he (I daresay quite properly) refused; but in my opinion the reports of the presiding inspector ought not to have been treated as confidential.

It appears from the report of the decision of the Divisional Court in the Law Reports [1913] 1 K. B. 463, that one of the points made by the appellant's counsel was that the appellant's appeal was not in fact heard by the Local Government Board or any qualified deputy at all, but only by an officer not qualified to perform any judicial function or to arrive at any decision relating to the appeal either in law or in fact. \* \* \* <sup>21</sup>

I have come to the conclusion that the nondisclosure of these documents, when the disclosure was asked for, is itself inconsistent with natural justice. In arriving at this conclusion I have, as indeed was suggested by the Solicitor General, dealt only with the nonproduction of the inspector's report after the second inquiry as the strongest in-

<sup>21</sup> As to this point; see *infra*, pp. 278, 279.



stance in support of the claim for a certiorari. The Solicitor General in terms admitted that the duty of the Local Government Board in this case involved doing nothing inconsistent with natural justice. Although in my judgment I have dealt only with the nonproduction of the report after the second inquiry, I think it right to call attention to a statement appearing in a letter written by the assistant secretary, W. T. Jerred, of the Local Government Board on January 8, 1912, answering a large number of observations and objections to the appeal based on the procedure of the Local Government Board in respect of the earlier appeals. That letter contains the following passage:

"In order that there may be no misapprehension on the subject, the Board think it right to state that in dealing with the matter they will take into consideration the appeals addressed to them on the 19th October and on the 15th November, as well as all the circumstances of the case, and that they will give their decision accordingly. In the circumstances the Board will be willing to consider any further statement which may be submitted to them by or on behalf of the appellant with reference to the subject-matter of his appeal. Any such statement should be made in writing and should be addressed to the Board within seven days from the date of this letter."

I do not see how the appellant could make a statement such as he is here invited to make when he had not seen the report made on the first inquiry any more than he had seen the report of the second inquiry.

Sir Horace Monro, the Permanent Secretary of the Local Government Board, makes in paragraph 2 of his affidavit of July 12, 1912, the following statement:

"I have read the affidavit of William Arlidge sworn herein on the 15th day of April, 1912, and I say that the order made by the Local Government Board dated the 26th day of February, 1912, and therein referred to was made after full and careful consideration of the reports made to the Board by their inspector, Edward Leonard, and the evidence and documents which accompanied those reports. A large number of observations and objections put forward on Mr. Arlidge's behalf by his solicitors and hereinafter referred to were also considered, and before a final decision was come to, Mr. Arlidge was invited by letter dated the 8th day of January, 1912, and addressed to his solicitors to place before the Board for their consideration any further statement which he might desire them to consider with reference to the subject-matter of his appeal before the making of the order."

These facts which I have stated seem to be relevant to the matters under discussion.

I think that the appeal should be allowed and that the order in question of February 26, 1912, should be quashed and sent back to the Local Government Board to be determined in the manner provided by law.

## 46 LOCAL GOVERNMENT BOARD v. ARLIDGE.

House of Lords. [1915] A. C. 120.

LORD SHAW OF DUNFERMLINE. \* \* \* The next proposition is this, that when a public local inquiry has been held in compliance with statute, the person whose interests are affected is entitled to something more, namely, a disclosure of the views of the inspector written out by him, in jottings or otherwise, for the guidance or consideration of the department in dealing with the case.

My Lords, it is here (and the matter is not a strictly legal one) that I venture to hold an opinion somewhat different from that of Lord SUMNER. I incline to hold that the disadvantage in very many cases would exceed the advantage of such disclosure. And I feel certain that if it were laid down in courts of law that such disclosure could be compelled, a serious impediment might be placed upon that frankness which ought to obtain among a staff accustomed to elaborately detailed and often most delicate and difficult tasks. The very same argument would lead to the disclosure of the whole file. It may contain, and frequently does contain, the views of inspectors, secretaries, assistants, and consultants of various degrees of experience many of whose opinions may differ but all of which form the material for the ultimate decision. To set up any rule that that decision must on demand, and as matter of right, be accompanied by a disclosure of what went before, so that it may be weakened or strengthened or judged thereby, would be inconsistent, as I say, with efficiency, with practice, and with the true theory of complete parliamentary responsibility for departmental action. This is, in my opinion, implied as the legitimate and proper consequence of any department being vested by statute with authority to make determinations. \* \* \*

The second objection raised is that the respondent was entitled to see the report of the inspector, and that to withhold this document, deprived him of a fair hearing in accord with the principles of substantial justice. The only word in the statute on which a claim to see the report can be based is the word "public" prefixed to "local inquiry." This word is said to have been used for the first time in the 1909 Act. In my opinion a public local inquiry means no more than that an inquiry should be held in the locality and be open to the public. It was well known in 1909 that the Local Government Board did not in ordinary cases publish the reports of inspectors before whom local inquiries were held. Unless an opposite intention is declared, or can be inferred, a statutory form of procedure should be construed so as to conform with prevailing practice. It was argued that there was a particular reason why in this instance the report should be published since its nondisclosure would be an interference with the right to obtain a special case for the opinion of the court on any question of law arising in the course of an appeal. It is just possible that the nondisclosure of the

terms of the report might make it more difficult in some particular instance to formulate a claim for a special case, but in substance the materials on which to base a right to such a case would be independent of the inspector's report, and the view of the inspector on a matter of law would not be material.

The present case is a good illustration. If the respondent was desirous of raising, as a matter of law, any question as to the constitution of the tribunal, the nondisclosure of the report, or the right to give oral testimony, all the material to raise any of these questions was open to him quite apart from any information to be obtained from an inspection of the inspector's report. Any opinion expressed by the inspector on such matters could in no way have altered the legal obligation. It is true that there is no statutory prohibition against the publishing of the inspector's report. If I thought that this nondisclosure deprived the respondent of a fair hearing in accord with the terms of substantial justice, I should accede to the argument on behalf of the respondent, and should hold the same view whether the appeal is to be regarded as a quasi judicial act or as a decision on review of the administrative action of the local authority. I am unable, however, to come to any such conclusion, and doubt whether assistance is to be gained from arguments based on analogous cases. The analogy of an official referee, referred to by Mr. Upjohn in argument, appears to me to have as much weight as the analogies on the other side referred to by the Attorney General. If the report of the inspector could be regarded as in the nature of evidence tendered either by the local authority or the owner of the premises, there would be a strong reason for publicity. In my opinion it is nothing of the kind, and is simply a step in the statutory procedure for enabling an administrative body, such as the Local Government Board, to hear effectively an appeal against the order of the local authority.) The obligation on the Local Government Board to hold a public inquiry in the locality is to enable the facts on either side to be ascertained by oral testimony subjected to the test of cross-examination, if either party should so require, and to ensure in this respect a full opportunity to the appellant to be heard before dismissing his appeal against the decision of the local authority. \* \* \*

Order of the Court of Appeal reversed and order of the King's Bench Division [discharging the rule nisi, and thus sustaining the order of the Local Government Board] restored.<sup>22</sup>

<sup>22</sup> See *Sabre v. Rutland R. Co.*, 86 Vt. 347, 354, 85 A. 693, Ann. Cas. 1915C, 1269 (1913). Quoted p. 181, *infra*.



## SECTION 10.—PUBLIC UTILITY COMMISSIONS

"In creating such an administrative agency the Legislature to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function."—*Wichita Railroad & Light Co. v. Public Utilities Commission of Kansas*, 260 U. S. 48, 59, 43 S. Ct. 51, 55, 67 L. Ed. 124 (1922).

## INTERSTATE COMMERCE COMMISSION v. LOUISVILLE &amp; NASHVILLE R. CO.

Supreme Court of the United States, 1913. 227 U. S. 88, 33 S. Ct. 185, 57 L. Ed. 431.

Appeal from the United States Commerce Court to review a decree which annulled an order of the Interstate Commerce Commission reducing rates. Reversed.

Mr. Justice LAMAR delivered the opinion of the Court. \* \* \*

On the appeal here, the government insisted that while the act of 1887 to regulate commerce (24 Stat. 379, c. 104, §§ 14-16, U. S. Comp. Stat. Supp. 1911, p. 1284) made the orders of the Commission only prima facie correct, a different result followed from the provision in the Hepburn act of 1906 (34 Stat. 584, c. 3591, § 4, U. S. Comp. Stat. Supp. 1911, p. 1297), that rates should be set aside if after a hearing the "Commission shall be of the opinion that the charge was unreasonable." In such case it insisted that the order based on such opinion is conclusive, and (though *Interstate Commerce Commission v. Union P. R. Co.*, 222 U. S. 547, 56 L. Ed. 311, 32 S. Ct. 108, was to the contrary) could not be set aside, even if the finding was wholly without substantial evidence to support it.

1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the "indisputable character of the evidence" (*Tang Tun v. Edsell*, 223 U. S. 681, 56 L. Ed. 610, 32 S. Ct. 359; *Chin Yow v. United States*, 208 U. S. 13, 52 L. Ed. 370, 28 S. Ct. 201; *Low Wah Suey v. Backus*, 225 U. S. 468, 56 L. Ed. 1167, 32 S. Ct. 734; *Zakonaite v. Wolf*, 226 U. S. 272, 57 L. Ed. 218, 33 S. Ct. 31), or if the facts found do not, as a matter of law, support the order made (*Interstate Commerce Commission v. Baltimore & S. W. R. Co.*, 226 U. S. 14, 57 L. Ed. 104, 33 S. Ct. 5, Cf. *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 20, 51 L. Ed. 942, 27 S. Ct. 585; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 301, 45 L. Ed. 201, 21 S. Ct. 115; *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535; *Interstate Commerce Commission v. Illinois C. R. Co.*, 215 U. S. 470, 54 L. Ed. 287, 30 S. Ct. 155; *Southern P. Co. v. Interstate Commerce Commission*, 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288; *Muser v. Magone*, 155 U. S. 247, 39 L. Ed. 137, 15 S. Ct. 77).

2. The government's claim is not only opposed to the ruling in *Interstate Commerce Commission v. Union P. R. Co.*, 222 U. S. 547, 56 L. Ed. 311, 32 S. Ct. 108, and the cases there cited, but is contrary to the terms of the act to regulate commerce, which in its present form provides (25 Stat. 861, c. 382, § 6, U. S. Comp. Stat. 1901, p. 3168), for methods of procedure before the Commission that "conduce to justice." The statute, instead of making its orders conclusive against a direct attack, expressly declares that they may "be suspended or set aside by a court of competent jurisdiction." 36 Stat. 551, c. 309, § 12. Of course, that can only be done in cases presenting a justiciable question. But whether the order deprives the carrier of a constitutional or statutory right, whether the hearing was adequate and fair, or whether for any reason the order is contrary to law, are all matters within the scope of judicial power.

3. Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable there was no jurisdiction to make the order. *Interstate Commerce Commission v. Northern P. R. Co.*, 216 U. S. 544, 54 L. Ed. 609, 30 S. Ct. 417. In a case like the present the courts will not review the Commission's conclusions of fact (*Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U. S. 251, 55 L. Ed. 456, 31 S. Ct. 392) by passing upon the credibility of witnesses or conflicts in the testimony. But the legal effect of evidence is a question

of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, be "set aside by a court of competent jurisdiction." 36 Stat. 551, c. 309.

4. The government further insists that the commerce act (26 Stat. 743, c. 128, U. S. Comp. Stat. 1901, p. 3163) requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created; and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing—for manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute. The information gathered under the provisions of section 12 may be used as basis for instituting prosecutions for violations of the law, and for many other purposes, but is not available, as such, in cases where the party is entitled to a hearing. The Commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 48 L. Ed. 860, 24 S. Ct. 563. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding. *Interstate Commerce Commission v. Baltimore, etc., R. R.*, 226 U. S. 14, 57 L. Ed. 104, 33 S. Ct. 5.

As these contentions of the government must be overruled, it is necessary to examine the record with a view of determining whether there was substantial evidence to support the order. \* \* \*



## THE CHICAGO JUNCTION CASE.

BALTIMORE &amp; O. R. CO. et al. v. UNITED STATES et al.

Supreme Court of the United States, 1924. 264 U. S. 258, 44 S. Ct. 317, 68 L. Ed. 667.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The Chicago Junction Railway and the Chicago River & Indiana Railroad are terminal railroads located within the Chicago switching district. Prior to May 16, 1922, they were operated as independent belt lines, uncontrolled by any trunk line carrier, and they were used by the 23 railroads entering Chicago, impartially and without discrimination. Among these were the New York Central Lines and their chief competitors, the 6 carriers who are plaintiffs in this suit.<sup>23</sup> The New York Central sought to obtain control of these terminal railroads. To this end, it made an application to the Interstate Commerce Commission, on December 28, 1920, under paragraph 18 of section 1 and paragraph 2 of section 5 of the Act to Regulate Commerce, as amended by Transportation Act 1920, c. 91, 41 Stat. 456, 477, 481.<sup>24</sup> The authorization requested was to make an agreement with stockholders then owning these properties by which, among other things, the New York Central would purchase all the capital stock of the Chicago River & Indiana Railroad for \$750,000, and the latter company would lease for 99 years (and thereafter) the Chicago Junction Railway at an annual rental of \$2,000,000. Upon this application hearings were had. The Baltimore & Ohio Railroad, and its coplaintiffs herein, intervened, and opposed granting the application. On May 16, 1922, an order was entered which authorized the New York Central to acquire the Chicago River & Indiana Railroad stock, and authorized the latter company to lease the Chicago Junction Railway.<sup>25</sup> Chicago Junction Case, 71 Interst. Com.

<sup>23</sup> The Baltimore & Ohio, the Pennsylvania, the Chicago & Erie, the Grand Trunk Western, the Chicago, Indianapolis & Louisville, and the Pittsburg, Cincinnati, Chicago & St. Louis. The Wabash, originally joined as plaintiff, was dismissed on its motion.—[*Note by judge.*]

<sup>24</sup> Neither of the operating companies affected joined in the application of the New York Central, and no separate application to the Commission was filed by either of them; but they were represented before the Commission, and the petition of the New York Central prayed that the several corporations involved be authorized to sell and to buy such stock, and to execute such lease, and that the Commission "issue in respect thereof its certificate of public convenience and necessity."—[*Note by judge.*]

<sup>25</sup> The report, entitled "By the Commission," states that the authority is granted subject only to the observance of 17 conditions which it enumerates. Applications under paragraph 18 of section 1 and paragraph 2 of section 5 are customarily heard by division 4 consisting of four commissioners. See Interstate Commerce Act, § 17; Annual Report of the Commission for 1920, pp. 3-6. But this case was heard by the full Commission. The Commission consists of eleven members. Only four concurred entirely in what is called the report of the Commission. Four others dissented wholly. One "concurred in part," declaring that the "facts warrant grant of authority without elaboration of conditions," which (with two exceptions) seemed to him "vain, perhaps harm-

Conn. R. 631. The order did not fix the date when it should become effective.<sup>26</sup> Immediately after its entry, the purchase of the stock was completed and the lease was executed.

On April 10, 1923, this suit was brought in the federal court for the Eastern district of Illinois against the United States, the Commission, the New York Central, the terminal railroads, and the stockholders thereof.<sup>27</sup> The relief sought is to have the order declared void, to have set aside the sale of the stock and the lease, to restore the status quo ante the order, and for an injunction. The case was heard before three judges on plaintiffs' motion for an interlocutory injunction and on defendants' motions to dismiss the bill.<sup>28</sup> The District Court, without opinion, denied the injunction and dismissed the bill. The case is here on direct appeal under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (Comp. St. § 998).

The order did not provide for the issue of a certificate of public convenience and necessity. It did not disclose whether it was issued under paragraph 18 of section 1 or under paragraph 2 of section 5. An application, by the carriers who are plaintiffs herein, that this be specified was denied by the Commission without opinion. In this court counsel for all the defendants stated that the order was entered solely under paragraph 2 of section 5. We have, therefore, no occasion to consider the incidents of applications under paragraph 18 of section 1, or rights thereunder. Several reasons are urged why the order should be held void. The defendants, besides asserting its validity, insist that the plaintiffs have no interest which entitles them to assail the order, and that there are, also, other obstacles to the maintenance of this suit.

First. Plaintiffs contend that the order is void because there was no evidence to support the finding that the acquisition of control of the

ful." The two other members concurred "in the result reached in the report," but declared that the opinion "should recognize explicitly that the application should have been entertained under section 1, paragraph 18, of the act, and that in accordance therewith a certificate of public convenience and necessity should be incorporated in the order entered."—[*Note by judge.*]

<sup>26</sup> On May 29, 1922, the intervening carriers filed a petition praying that the order be set aside or modified. The petition was denied June 12, 1922.—[*Note by judge.*]

<sup>27</sup> The agreement of the New York Central was with the Chicago Junction Railways and Union Stockyards Company, a holding company, which owned all the stock in the Chicago River & Indiana Railroad and half of the stock in the Chicago Junction Railway; the other half being owned by Richard Fitzgerald, who wished to join in making the sale transferring control. The property to be leased included the railroad of the Union Stockyards & Transit Company of Chicago, which had theretofore been leased to the Chicago Junction Railway.—[*Note by judge.*]

<sup>28</sup> When the cause was heard on the original bill, the hearing was upon motions to dismiss filed by the United States, the New York Central, the Chicago River & Indiana Railroad, the Chicago Junction Railways and Union Stockyards Company, the Chicago Junction Railway, and Richard Fitzgerald, and upon the answer of the Interstate Commerce Commission. The bill was then amended. Thereupon the case was heard solely on the motions to dismiss.—[*Note by judge.*]

terminal railroads by the New York Central "will be in the public interest." The bill charges, in clear and definite terms, that this finding was wholly unsupported by evidence. We must take that fact as admitted for the purposes of this appeal. The allegation is made as one of fact. There is no suggestion in the motions to dismiss (which are both general and special) that this fact is not well pleaded, or that a copy of the evidence introduced at the hearing should have been annexed to the bill. Compare *Louisiana & Pine Bluff Ry. Co. v. United States*, 257 U. S. 114, 42 S. Ct. 25, 66 L. Ed. 156. Facts conceivably known to the Commission, but not put in evidence, will not support an order. *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93, 33 S. Ct. 185, 57 L. Ed. 431. The defendants concede that the New York Central could not legally acquire control of these terminal railroads unless authorized so to do by the Commission, pursuant to paragraph 2 of section 5, and that the Commission cannot legally grant such authority unless it finds, after hearing, that the acquisition "will be in the public interest." They contend that this order is not one of those subject to judicial review, and that, if subject to review, it cannot be held void merely because unsupported by evidence. These objections are based on the nature of the order, not on the class of persons by whom the judicial review is invoked.

Whether this order can be described properly as legislative may be doubted. It is clear that legislative character alone would not preclude judicial review. Rate orders are clearly legislative. *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 226, 29 S. Ct. 67, 53 L. Ed. 150. Nor would the further fact that the order is permissive preclude review, if by that term is meant an order which, in contradistinction to one compelling performance authorizes a carrier to do some act otherwise prohibited. Orders entered under the Act of June 18, 1910, c. 309, § 8, 36 Stat. 539, 547 (Comp. St. § 8566), amending section 4 of the Interstate Commerce Act, are of this character. That section prohibits carriers from charging more "for a shorter than for a longer distance over the same line or route in the same direction" without obtaining authority from the Commission. A suit will lie to set aside an order granting such authority, and to enjoin action by the carrier thereunder. *Skinner & Eddy Corporation v. United States*, 249 U. S. 557, 562, 39 S. Ct. 375, 63 L. Ed. 772. Compare *United States v. Merchants' & Manufacturers' Traffic Association*, 242 U. S. 178, 37 S. Ct. 24, 61 L. Ed. 233. (The order here challenged is wholly unlike those which have been held not subject to judicial review.) In *United States v. Illinois Central R. R. Co.*, 244 U. S. 82, 89, 37 S. Ct. 584, 61 L. Ed. 1007, the action of the Commission, with which the court refused to interfere, was the assignment of a complaint for hearing. As this court said: "The notice \* \* \* had no characteristic of an order, affirmative or negative." In *Proctor & Gamble v. United States*, 225 U. S. 282, 32 S. Ct. 761, 56 L. Ed. 1091, *Hooker v. Knapp*, 225 U. S. 302, 32 S. Ct. 769, 56 L. Ed. 1099, and *Lehigh Valley R. R. Co. v. United States*, 243 U. S. 412, 37 S. Ct. 397, 61 L. Ed. 819, judicial re-



view was refused, not because the order was permissive, or because it was negative in character, but because it was a denial of the affirmative relief sought.<sup>29</sup> This court declined to interfere, because to do so would have involved exercise by it of the administrative function of granting the relief which the Commission, in the exercise of its jurisdiction, had denied. Here the order complained of is an affirmative one; that is, it grants the relief sought. Compare *Manufacturers' Ry. Co. v. United States*, 246 U. S. 457, 483, 38 S. Ct. 383, 62 L. Ed. 831.

It is further contended that paragraph 2 of section 5 confers a power purely discretionary, and, that, for this reason, the order entered cannot be set aside by a court merely on the ground that the action taken was based on facts erroneously assumed, or of which there was no evidence.<sup>30</sup> The power here challenged is not of that character. Congress by using the phrase "whenever the Commission is of opinion, after hearing," prescribed quasi judicial action.<sup>31</sup> Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing.<sup>32</sup> The provision for a hearing implies both

<sup>29</sup> Compare *Interstate Commerce Commission v. Waste Merchants Ass'n*, 260 U. S. 32, 43 S. Ct. 6, 67 L. Ed. 112 (1922). The mandamus was granted in *Interstate Commerce Commission v. Humboldt Steamship Co.*, 224 U. S. 474, 32 S. Ct. 556, 56 L. Ed. 849 (1912), and *Louisville Cement Co. v. Interstate Commerce Commission*, 246 U. S. 638, 38 S. Ct. 408, 62 L. Ed. 914 (1918), because the Commission erroneously refused to assume jurisdiction. See, also, *Kansas City Southern Ry. Co. v. Interstate Commerce Commission*, 252 U. S. 178, 40 S. Ct. 187, 64 L. Ed. 517 (1920).—[*Note by judge.*]

<sup>30</sup> Compare *Martin v. Mott*, 12 Wheat. 19, 29-33, 6 L. Ed. 537 (1827); *Philadelphia & Trenton R. R. Co. v. Stimpson*, 14 Pet. 448, 458, 10 L. Ed. 535 (1840).—[*Note by judge.*]

<sup>31</sup> The same phrase is used in the Interstate Commerce Act in respect to many other classes of orders. These orders, so far as considered by this Court, have uniformly been held to be subject to judicial review; and where an essential finding was unsupported by evidence the order was declared to be void. (1) Unreasonable rates, section 15, par. 1, *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91, 33 S. Ct. 185, 57 L. Ed. 431 (1913); *Florida East Coast Line v. United States*, 234 U. S. 167, 185, 34 S. Ct. 867, 58 L. Ed. 1267 (1914). (2) Discriminatory rates, section 15, par. 1, compare *New York v. United States*, 257 U. S. 591, 600, 42 S. Ct. 239, 66 L. Ed. 385 (1922). (3) Switching connections, section 1, par. 9, *United States v. Baltimore & Ohio Southwestern Ry. Co.*, 226 U. S. 14, 33 S. Ct. 5, 57 L. Ed. 104 (1912). (4) Division of joint rates, section 15, par. 6, compare *The New England Divisions Case*, 261 U. S. 184, 203, 43 S. Ct. 270, 67 L. Ed. 605 (1923). (5) Pooling, section 5, par. 1. (6) Railroad control of water carriers, section 5, par. 10. (7) Valuation, section 19a, par. Fifth (i).—[*Note by judge.*]

<sup>32</sup> Transportation Act 1920, like the original Act to Regulate Commerce and earlier amendments, distinguished, by the language used and also in other respects, between those orders which can be made only after hearing and those as to which no hearing is required. Thus, orders on applications for extension of line, for new construction, or for abandonment under section 1, pars. 18-20, can be made only after hearing. But in the case of applications concerning the issue of securities under section 20a, par. 6, the Commission may hold hearings "if it sees fit." See *Miller v. United States (D. C.)* 277 F. 95 (1921). And under the emergency provisions, section 1, pars. 15 and 16, and section 15, par. 4, the order may be issued without a hearing, but "terms" are fixed after "subsequent hearings." *Peoria & Pekin Union Ry. Co. v. United States*, 263 U. S. 528, 44 S. Ct. 194, 68 L. Ed. 427, decided January 7, 1924.—[*Note by judge.*]

the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action. As it was admitted by the motion that the order was unsupported by evidence, and since such an order is void, there is no occasion to consider the other grounds of invalidity asserted by plaintiffs.

Second. The defendants contend that the plaintiffs have not the legal interest necessary to entitle them to challenge the order. That they have in fact a vital interest is admitted. They are the competitors of the New York Central. Practically all the tonnage originated at or destined to points on these terminal railroads is competitive, in that the same can be hauled either over the lines of New York Central or over those of the plaintiffs. Prior to the date of the order, and while the terminal railroads were uncontrolled by any trunk line carrier, they were all served impartially and without discrimination, and they competed for the traffic on equal terms. The order substitutes for neutral control of the terminal railroads, monopoly of control in the New York Central, and, in so doing, necessarily gives to it substantial advantage over all its competitors and subjects the latter to serious disadvantage and prejudice. The main purpose of the acquisition by the New York Central was to secure a larger share of the Chicago business. By means of the preferential position incident to the control of these terminal railroads, it planned to obtain traffic theretofore enjoyed by its competitors. Because such was the purpose of the New York Central control and would necessarily be its effect these plaintiffs intervened before the Commission. That their apprehensions were well founded is shown by the results. The plaintiffs are no longer permitted to compete with the New York Central on equal terms. A large volume of traffic has been diverted from their lines to those of the New York Central. The diversion of traffic has already subjected the plaintiffs to irreparable injury. The loss sustained exceeds \$10,000,000. Continued control by the New York Central will subject them to an annual loss in net earnings of approximately that amount. If, as suggested in *Interstate Commerce Commission v. Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, 109, 30 S. Ct. 651, 54 L. Ed. 946, a legal interest exists where carriers' revenues may be affected, there is clearly such an interest here.

This loss is not the incident of more effective competition. Compare *Edward Hines Trustees v. United States*, 263 U. S. 143, 148, 44 S. Ct. 72, 68 L. Ed. 216. It is injury inflicted by denying to the plaintiffs equality of treatment. To such treatment carriers are, under the Interstate Commerce Act, as fully entitled as any shipper. *Pennsylvania Co. v. United States*, 236 U. S. 351, 35 S. Ct. 370, 59 L. Ed. 616. It is true that, before Transportation Act 1920, the Interstate Commerce Act would not have prohibited the owners of the terminal railroads from selling them to the New York Central. Nor would it have prohibited the latter company from making the purchase. And by reason of a

provision then contained in section 3 of the Interstate Commerce Act the purchase might have enabled the New York Central to exclude all other carriers from use of the terminals. Compare *Louisville & Nashville R. R. Co. v. United States*, 242 U. S. 60, 37 S. Ct. 61, 61 L. Ed. 152; *Manufacturers' Ry. Co. v. United States*, 246 U. S. 457, 482, 38 S. Ct. 383, 62 L. Ed. 831. But Transportation Act 1920 repealed that provision in section 3, it made provision for securing joint use of terminals, and it prohibited any acquisition of a railroad by a carrier, unless authorized by the Commission. By reason of this legislation, the plaintiffs, being competitors of the New York Central and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer the control to that company.

The plaintiffs may challenge the order because they are parties to it. Judicial Code, § 212 (originally Commerce Court Act June 18, 1910, c. 309, 36 Stat. 543 [Comp. St. § 1005]), declares that any party to a proceeding before the Commission may, as of right, become a party to "any suit wherein is involved the validity of such order." The section does not in terms provide that such party may institute a suit to challenge the order. But this is implied. For, otherwise, there would in some cases be no redress for the injury inflicted by an illegal order. Moreover, the fact of intervention, allowed as it was, implies a finding by the Commission that the plaintiffs have an interest. In the proceeding before the Commission, they opposed by evidence and argument the granting of the application. This they did as of right. For under the rules of practice, adopted by the Commission pursuant to paragraph 1 of section 17 of the Interstate Commerce Act, the intervener becomes a party to the proceeding, entitled, like any other party, to appear at the taking of testimony, to produce and cross-examine witnesses, and to be heard in person or by counsel.<sup>33</sup> The intervention must be preceded by an order of the Commission granting leave, and leave can be granted only to one showing interest. No case has been found in which either this court, or any lower court, has denied to one who was a party to the proceedings before the Commission the right to challenge the order entered therein. On the other hand, persons who were entitled to become parties before the Commission, but did not do so, have been allowed to maintain such suits where the requisite interest was shown.

<sup>33</sup> Rules of Practice (1923) pp. 2, 27, 28. The Commission, like courts, distinguishes between those who are permitted to intervene, and thus become parties, and persons who are merely permitted to be heard. See *Hurlburt v. Lake Shore & Michigan Southern Ry. Co.*, 2 Interst. Com. Com'n R. 122, 125 (1888). Compare *Ex parte Leaf Tobacco Board of Trade*, 222 U. S. 578, 32 S. Ct. 833, 56 L. Ed. 323 (1911).

Leave to intervene can be granted only to one entitled under the act to complain to the Commission. The right to complain was broadly bestowed by Congress. Act Feb. 4, 1887, c. 104, § 13, 24 Stat. 379, 383, as amended by Act June 18, 1910, c. 309, § 11, 36 Stat. 539, 550, 557. From its inception the Commission has construed liberally this right to complain. See *Boston & Albany R. R. Co. v. Boston & Lowell R. R. Co.*, 1 Interst. Com. Com'n R. 158, 173, 174 (1887); *In re Chicago, St. Paul & Kansas City Ry. Co.*, 2 Interst. Com. Com'n R. 231, 235 (1888).—[Note by judge.]



*Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 49, 32 S. Ct. 22, 56 L. Ed. 83; *Skinner & Eddy Corporation v. United States*, 249 U. S. 557, 562, 39 S. Ct. 375, 63 L. Ed. 772.<sup>34</sup> \* \* \*

Reversed.

Mr. Justice SUTHERLAND (dissenting). I think the injuries alleged to have been sustained by complainants are not such as to afford the basis for a legal remedy. Complainants are interested only in the sense that the acquisition of the rights here in question by their competitor will enable the latter to absorb a larger share of the business. That is not enough to constitute a remediable interest.

Before Transportation Act 1920, the New York Central would have been free to acquire these terminals without the consent of the Commission. If it had done so, its gain of business, with the resulting loss to complainants, would have been the same; but it would be inadmissible to assert that complainants might have maintained a suit to annul or enjoin the acquisition on the ground of that injury. "The effort of a carrier to obtain more business \* \* \* proceeds from the motive of self-interest, which is recognized as legitimate." *United States v. Illinois Central R. R. Co.*, 263 U. S. 515, 44 S. Ct. 189, 68 L. Ed. 417, decided January 7, 1924. See *Johnson v. Hitchcock*, 15 Johns. (N. Y.) 185.

It is claimed, however, that Transportation Act 1920 so alters the rule as to give a right of action to complainants where none existed before. I am unable to perceive any sound basis for the conclusion. That act, so far as this question is concerned, requires the carrier, as a prerequisite to an acquisition of the character here under consideration, to secure the authorization of the Commission, which that body may grant if "it will be in the public interest." The mere effect of such acquisition upon the business of competing lines is no more to be considered since the act of 1920 than it was prior to the passage thereof. — It is the public, not private, interest which is to be considered.

<sup>34</sup> The order involved in the latter case—relief from the operation of the fourth section—resembles in character that here in question.

See also *Nashville Grain Exchange v. United States* (Com. C.) 191 F. 37 (1911); *Atlantic Coast Line v. Interstate Commerce Commission* (Com. C.) 194 F. 449 (1911). *Merchants' & Manufacturers' Traffic Association v. United States* (D. C.) 231 F. 292 (1915); *McLean Lumber Co. v. United States* (D. C.) 237 F. 460 (1916); *City of New York v. United States* (D. C.) 272 F. 768, 769 (1921); *Village of Hubbard v. United States* (D. C.) 278 F. 754, 759 (1922); *Tennessee v. United States* (D. C.) 284 F. 371 (1922); *Nashville, etc., Ry. v. Tennessee*, 262 U. S. 318, 43 S. Ct. 583, 67 L. Ed. 999 (1923); *Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co.* (D. C.) 286 F. 540, 548 (1923).

In *Edward Hines Trustees v. United States*, 263 U. S. 143, 147, 148, 44 S. Ct. 72, 68 L. Ed. 216 (1923), the bill was dismissed because it failed to disclose any interest in the plaintiff. Cases like *Railroad Co. v. Ellerman*, 105 U. S. 166, 26 L. Ed. 1015 (1881), which are not brought under the Interstate Commerce Act, have no bearing on the question here presented. The contention that under the principle applied in *Muskat v. United States*, 219 U. S. 346, 31 S. Ct. 250, 55 L. Ed. 246 (1911), Congress was without power to confer upon persons situated like the plaintiffs the right to challenge in the courts the validity of the order, is unsound.—[Note by judge.]

The complainants have no standing to vindicate the rights of the public, but only to protect and enforce their own rights. Redress for public grievances must be sought by public agents, not by private intervention. *Telephone Co. v. Railroad Commission*, 174 Mich. 219, 140 N. W. 496. The right of the complainants to sue, therefore, cannot rest upon the alleged violation of a public interest, but must rest upon some distinct grievance of their own. Loss of business, or of opportunities to get business, attributable to the activity or increase of facilities on the part of a competitor, is not enough. Transportation Act 1920 lays down no new or additional rule by which the question, What constitutes a legal or equitable right, interference with which may give rise to an action? may be tested, and the determination of that question must still rest upon general principles of jurisprudence. See *Peavey & Co. v. Union Pacific R. Co.* (C. C.) 176 F. 409, 417. In *Railroad v. Ellerman*, 105 U. S. 166, 174, 26 L. Ed. 1015, this court held that a private complainant may not be heard by a court except for an "invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed."

If it were conceded that the acquisition of the terminals by the New York Central was in the public interest, I suppose it would not be contended that complainants had any standing to interfere on the ground that their opportunities for obtaining business had been impaired. And, since they are without legal right to intervene to redress a public grievance, the contrary fact that the acquisition will not be in the public interest cannot avail them. Their complaint must stand or fall upon the nature of their own grievance. A private injury, for which the law affords no remedy, cannot be converted into a remediable injury, merely because it results from an act of which the public might complain. In other words, the law will afford redress to a litigant only for injuries which invade his own legal rights; and since the injuries here complained of are not of that character, and do not result from the violation of any obligation owing to the complainants, it follows that they are without legal standing to sue.

The decision of the court here proceeds upon the theory that the injury complained of is a denial of equality of treatment in the use of the terminals; but I do not understand this to be the gravamen of the bill. The complaint is of inequality of opportunity to get business—not of opportunity to use the terminals. Complainants' access to the use and enjoyment of the terminal facilities acquired by the New York Central remains the same in respect of any business they may obtain. Interstate Commerce Act, § 3 (3), (4), as amended by Transportation Act 1920, c. 91, 41 Stat. 479. The Commission granted the authorization only

upon condition that the neutrality of the terminals in their handling of traffic should be preserved.<sup>35</sup> If their use be lessened, therefore, it will not be because access to the terminals has been, or is in danger of being, restricted, but because, with less business, there will be less occasion to use them. An illustration may be helpful: Suppose, instead of these terminal facilities, the acquisition had been of a line of railroad running west from Chicago, which, prior thereto, had been neutral and whose business had been distributed without favor among the several eastern lines terminating at that city. It is manifest that the effect of such an acquisition would be, as it is here, to enable the New York Central to absorb more of the traffic of the railroad so acquired than theretofore, and consequently to lessen that received by other parallel lines running east from Chicago. In that situation, could any of such lines maintain a suit to annul the authorization of the Commission? It seems to me not, and I can see no difference in principle between the case supposed and that with which we are dealing.

I am authorized to say that Mr. Justice McREYNOLDS and Mr. Justice SANFORD concur in this dissent.

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### UNITED STATES v. ABILENE & S. RY. CO.

Supreme Court of the United States, 1924. 265 U. S. 274, 44 S. Ct. 565, 68 L. Ed. 1016.

Mr. Justice BRANDEIS delivered the opinion of the Court.

This is an appeal by the United States and the Interstate Commerce Commission from a decree of the federal court for Kansas which perpetually enjoined the enforcement of an order made by the Commission, on August 9, 1922, under section 15 (6) of the Interstate Commerce Act as amended by Transportation Act 1920, c. 91, § 418, 41 Stat. 456, 486 (Comp. St. Ann. Supp. 1923, § 8583). The order relates to the divisions of interstate joint rates on traffic interchanged, within the United States, by the Kansas City, Mexico & Orient system with 13 carriers whose lines make direct connection with it. The order provides that on all such interchanged traffic the existing divisions of these carriers shall be reduced by a fixed per cent., and that the Orient shall receive the amount so taken from its connections.<sup>36</sup> The order also directed the

<sup>35</sup> Among other conditions is the following.

"2. The present neutrality of handling traffic inbound and outbound by the Junction and River Road organization shall be continued so as to permit equal opportunity for service to and from all trunk lines reaching Junction rails, without discrimination as to routing or movement of traffic which is competitive with the traffic of the Central, and without discrimination against such competitive traffic in the arrangement of schedules."—[Note by judge.]

<sup>36</sup> The percentage of the reduction prescribed in respect to the several carriers ranges from 10 to 30 per cent. Thus, the Missouri Pacific's division was shrunk 20 per cent. It was estimated that the resulting reduction of its revenues would be \$115,789.22. That amount, added to the existing share of the



Orient and the connecting carriers to make, at stated intervals, reports of the financial results of the divisions ordered, permitted any carrier to except itself from the order, in whole or in part, by proper showing, and retained jurisdiction in the Commission "to adjust on the basis of such reports the divisions herein prescribed or stated, if such adjustment shall to us seem proper." Kansas City, Mexico & Orient Divisions, 73 Interst. Com. Com'n R. 319, 329. \* \* \*

Fourth. The plaintiffs contend that the order is void because it rests upon evidence not legally before the Commission. It is conceded that the finding rests, in part, upon data<sup>37</sup> taken from the annual reports filed with the Commission by the plaintiff carriers pursuant to law; that these reports were not formally put in evidence; that the parts containing the data relied upon were not put in evidence through excerpts; that attention was not otherwise specifically called to them; and that objection to the use of the reports, under these circumstances, was seasonably made by the carriers and was insisted upon. The parts of the annual reports in question were used as evidence of facts which it was deemed necessary to prove, not as a means of verifying facts of which the Commission, like a court, takes judicial notice. The contention of the Commission is that, because its able examiner gave notice that "no doubt it will be necessary to refer to the annual reports of all these carriers," its Rules of Practice<sup>38</sup> permitted matter in the re-

Orient on this traffic, would increase its division, on weighted average, over 14 per cent. The Texas & Pacific's division was also shrunk 20 per cent. The estimated resulting reduction of its revenues would be \$121,140.81. But that amount, added to the existing share of the Orient on this traffic, would increase its division about 25 per cent. The order differs from that upheld in New England Divisions Case, 261 U. S. 184, 43 S. Ct. 270, 67 L. Ed. 605 (1923), which prescribed a percentage increase of the division of the New England roads and directed that the amount of the increase be taken from the existing shares of the several connecting carriers.—[Note by judge.]

<sup>37</sup> These include for each of the carriers the data showing for the year freight tons, one mile; passengers, one mile; all revenue car miles; all revenue train miles; the total operating revenue; total operating expenses; net revenue and investment in road and equipment—and they involved calculation of the respective gross revenues per ton mile, per car mile, per train mile; operating expenses per train mile, per car mile, per ton mile; net revenue per ton mile, per car mile, per train mile; the return per \$1,000 of investment, on the gross revenue, the net revenue, and the railway operating income; the percentage of return on the gross revenue, the net revenue and the operating income. The net railway operating income for each of the lines is in the record.—[Note by judge.]

<sup>38</sup> Rule XIII, as in force prior to the revision of December 10, 1923, provides, in part:

"Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant and not intended to be put in evidence, such document will not be received, but the party offering the same shall present to opposing counsel and to the Commission true copies of such material and relevant matter, in proper form, which may be received in evidence and become part of the record.

"In case any portion of a tariff, report, circular, or other document on file with the Commission is offered in evidence, the party offering the same must give specific reference to the items or pages and lines thereof to be considered. The Commission will take notice of items in tariffs and annual or other period-

ports to be used as freely as if the data had been formally introduced in evidence.

The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent does not invalidate its order. *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 44, 24 S. Ct. 563, 48 L. Ed. 860; *Spiller v. Atchison, Topeka & Santa Fé Ry. Co.*, 253 U. S. 117, 131, 40 S. Ct. 466, 64 L. Ed. 810. Compare *Bilokumsky v. Tod*, 263 U. S. 149, 157, 44 S. Ct. 54, 68 L. Ed. 221. But a finding without evidence is beyond the power of the Commission. Papers in the Commission's files are not always evidence in a case. *New England Divisions Case*, 261 U. S. 184, 198, note 19, 43 S. Ct. 270, 67 L. Ed. 605. Nothing can be treated as evidence which is not introduced as such. *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88, 91, 93, 33 S. Ct. 185, 57 L. Ed. 431; *Chicago Junction Case*, 264 U. S. 258, 44 S. Ct. 317, 68 L. Ed. 667. If the proceeding had been, in form, an adversary one commenced by the Orient system, that carrier could not, under rule XIII, have introduced the annual reports as a whole. For they contain much that is not relevant to the matter in issue. By the terms of the rule, it would have been obliged to submit copies of such portions as it deemed material, or to make specific reference to the exact portion to be used. The fact that the proceeding was technically an investigation instituted by the Commission would not relieve the Orient, if a party to it, from this requirement. Every proceeding is adversary, in substance, if it may result in an order in favor of one carrier as against another. Nor was the proceeding under review any the less an adversary one, because the primary purpose of the Commission was to protect the public interest through making possible the continued operation of the Orient system. The fact that it was on the Commission's own motion that use was made of the data in the annual reports is not of legal significance.

It is sought to justify the procedure followed by the clause in rule XIII which declares that the "Commission will take notice of items in tariffs and annual or other periodical reports of carriers properly on file." But this clause does not mean that the Commission will take judicial notice of all the facts contained in such documents. (Nor does it purport to relieve the Commission from introducing, by specific reference, such parts of the reports as it wishes to treat as evidence.) It means that as to these items there is no occasion for the parties to serve

ical reports of carriers properly on file with it or in annual, statistical, or other official reports of the Commission. When it is desired to direct the Commission's attention to such tariffs or reports upon hearing or in briefs or argument it must be done with the precision specified in the second preceding sentence. In case any testimony in other proceedings than the one on hearing is introduced in evidence, a copy of such testimony must be presented as an exhibit. When exhibits of a documentary character are to be offered in evidence copies should be furnished opposing counsel for use at the hearing."—[*Note by judge.*]

copies. The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties.<sup>39</sup>

The right of the carriers to insist that the consideration of matter not in evidence invalidates the order was not lost by their submission of the case without argument and by their acquiescing in the suggestion that the presentation of a tentative report by the examiner be omitted. While the course pursued denied to the Commission the benefit of that full presentation of the contentions of the parties which is often essential to the exercise of sound judgment, it cannot be construed as a waiver by the carriers of their legal rights. The general notice that the Commission would rely upon the voluminous annual reports is tantamount to giving no notice whatsoever. The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void.

Fifth. A further objection of the carriers should be considered. They point out that the record does not contain any tariffs showing the individual joint rates, or any division sheets showing how these individual joint rates are divided, nor any information concerning the amount of service performed by the Orient and its several connections under such individual joint rates. As justification for this omission, it is argued that there are in the record exhibits, furnished by the several carriers, containing data from which the Commission could reach a conclusion as to whether or not the divisions, taken as a whole, were equitable as between the Orient and its several connections;<sup>40</sup> that in a general rate case evidence "deemed typical of the whole rate structure" will support a finding as to each rate in the structure by raising a rebuttable presumption concerning each rate; that typical "evidence" in this sense means, not evidence directly representative of every individual rate, but evidence tending to show the general situa-

<sup>39</sup> Its observance will not hamper the Commission in the performance of its duties. For, if the materiality of some fact in a report is not discovered by the Commission until after the close of the hearing, there is power to reopen it for the purpose of introducing the evidence.—[Note by judge.]

<sup>40</sup> The exhibits showed for the year 1921, the volume of traffic moving on joint rates and interchanged between the Orient and each of its direct connections; the part of the joint service performed by the Orient and the part performed by its connection; the revenue arising from the joint service, and how that revenue was divided. For example: The exhibits showed that, during 1921, the Santa Fé and the Orient interchanged 26,278 tons of freight; that with respect to such freight the Orient performed 8,162,294 ton miles of transportation and the Santa Fé 5,793,098 ton miles; that the revenue arising from this joint service was \$218,827.71, of which the Orient received \$106,889.59 and the Santa Fé \$111,938.12; that the per ton mile revenue of the Orient was 1.309 cents and the per ton mile revenue of the Santa Fé 1.932 cents.—[Note by judge.]



tion; that a like presumption arises in a division case; that the data dealing with the traffic in the aggregate, which was furnished by the exhibits, constituted such typical evidence; that, in this proceeding, information concerning individual rates and divisions was not essential; and that the course pursued by the examiner is, in substance, that upheld in the *New England Divisions Case*, 261 U. S. 184, 196-199, 43 S. Ct. 270, 67 L. Ed. 605.

The argument is not sound. The power conferred by Congress on the Commission is that of determining, in respect to each joint rate, what divisions will be just. Evidence of individual rates or divisions, said to be typical of all, affords a basis for a finding as to any one. But averages are apt to be misleading. It cannot be inferred that every existing division of every joint rate is unjust as between particular carriers, because the aggregate result of the movement of the traffic on joint rates appears to be unjust. These aggregate results should properly be taken into consideration by the Commission; but it was not proper to accept them as a substitute for typical evidence as to the individual joint rates and divisions. In the *New England Divisions Case*, tariffs and division sheets were introduced which, in the opinion of the Commission, were typical in character, and ample in quantity, to justify the findings made in respect to each division of each rate of every carrier. A like course should have been pursued in the proceeding under review.

Affirmed.

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FARMERS' ELEVATOR CO. v. CHICAGO, R. I. & P. RY. CO.

Supreme Court of Illinois, 1915. 266 IH. 567, 107 N. E. 841.

CARTER, J. (after stating the facts). Counsel for the appellant insist that this amended order was entered without a hearing, or at least an adequate hearing, as that term must be understood under said Public Utilities Act. From the provisions of said act, especially sections 45, 60, and 65 (Laws of 1913, p. 460), it is apparent that before such physical railroad connections can be compelled by the State Public Utilities Commission, between two railways there must be a hearing, and that, while technical rules of evidence are not required to be followed, the hearing must be open to the public. All parties interested who are to be bound by the decision must be given an opportunity to present evidence and be present, if they wish, during the entire hearing. On a hearing such as this, under said section 65, a record should be kept of all proceedings, and "all testimony shall be taken down by a stenographer appointed by the Commission, and the parties shall be entitled to be heard in person or by attorney."

The public utilities statute is in many of its features similar to the United States statute creating and governing the acts of the Interstate Commerce Commission. The Supreme Court of the United States,

in construing that statute, has held that the Interstate Commerce Commission in requiring track connection was not acting in a mere administrative manner, but as such an order as this resulted in the taking of property; therefore the persons interested must not be denied the right to show, as a matter of law, that such order was unjust or unreasonable. *Oregon Railroad & Navigation Co. v. Fairchild*, 224 U. S. 510, 32 S. Ct. 535, 56 L. Ed. 863. That court has also held that the Commission, in matters of this kind, is acting in a quasi judicial capacity, and while not limited to the same strict rules of law as to the admissibility of evidence as prevails in suits between private parties (*Interstate Commerce Com. v. Baird*, 194 U. S. 25, 24 S. Ct. 563, 48 L. Ed. 860), yet "the more liberal the practice in admitting testimony the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding, for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding." *Interstate Commerce Com. v. Louisville & Nashville Railroad Co.*, 227 U. S. 88, 33 S. Ct. 185, 57 L. Ed. 431. See, also, *United States v. Baltimore & Ohio Southwestern Railroad Co.*, 226 U. S. 14, 33 S. Ct. 5, 57 L. Ed. 104.

This reasoning as to hearings under the Interstate Commerce Law applies with peculiar force to hearings of this nature under the act here being considered. Allowing the testimony to be heard by the Commission or one of its members, without any opportunity to cross-examine the witnesses presenting it, amounts to a practical denial of the vital part of the hearing required by this statute. The words "public hearing" before any tribunal or body, by the accepted definitions of lexicographers and courts, mean the right to appear and give evidence and also the right to hear and examine the witnesses whose testimony is presented by opposing parties. See *Dick v. Supreme Body of International Congress*, 138 Mich. 372, 101 N. W. 564; 4 Words and Phrases, 3236; 2 Words and Phrases (Second Series) 832, and cases cited; 21 Cyc. 408, and cases cited.

Counsel for appellees insist that the situation is different on this record than is shown in the decisions of the United States courts just referred to; that in those cases evidence was not heard on behalf of the party objecting, while in this case appellant company had the opportunity of introducing all the evidence that its counsel desired on the

hearing of May 27, 1914; that the view of the premises by the Commission must be considered similar to the view of property by the jury during condemnation proceedings. With this we do not agree. A fair construction of the amended order entered by the Commission shows that none of the Commissioners visited Morris personally to look over the premises involved, but that the Commission "caused an investigation to be made" and "as a result of this investigation" entered the order in question. The finding of the Commission was not based upon the evidence heard by it or one of its members, but clearly upon the investigation that it caused to be made.<sup>1</sup> This construction of the order is in accordance with the facts as shown by the record. Furthermore, an order of this nature must be based upon the evidence presented in the public hearing, with a full opportunity to cross-examine the witnesses and present, if desired, evidence in rebuttal, and not upon an *ex parte* examination. In no other way can the interested party maintain his rights or make his defense.

Counsel for appellees further contend that appellant at the hearing of May 27, 1914, in effect agreed that there need be no further public hearing as to the tentative order for the physical connection. While the Commissioner in charge of the hearing made some statements during its progress that might be construed as showing that that was his understanding as to what was to be done, considering all that he did say on that question the conclusion must be reached that it was assumed that appellant company was to be heard further if it objected to any part of the tentative order. Moreover, we find nothing stated in the record by the representatives of the appellant company at this hearing that indicated anything to the contrary or in any manner waived their right to present further testimony to the Commission. The written objections filed by said company to the tentative order are in entire accord with this view.

For the reasons indicated it must be held that the final amended order of the Commission in this matter was entered without authority. This holding renders it unnecessary for us to consider the other questions raised by counsel for appellant—that the evidence does not show a public necessity for the taking of property, and that the subject-matter of the complaint was not within the jurisdiction of the State Public Utilities Commission.

The judgment of the circuit court must be reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

FR. ADM. LAW (2D ED.)



## CHICAGO &amp; N. W. RY. CO. v. RAILROAD COMMISSION.

Supreme Court of Wisconsin, 1914. 156 Wis. 47, 145 N. W. 216.

Proceeding by the Chicago & Northwestern Railway Company against the Railroad Commission to review an order requiring the establishment of a rate. From a judgment for the commission, the railroad company appeals. Affirmed.

TIMLIN, J. The appellant commenced this action against the respondent as authorized by section 1797—16, Wis. Stats., to review an order of the respondent commission bearing date November 23, 1912, requiring appellant to establish a rate of 1.7 cents per hundredweight for the transportation of ice from Silver Springs, Wis., to Milwaukee, Wis., instead of the rate of 2 cents per hundredweight theretofore existing, and awarding plaintiff reparation upon all shipments moved between said points from January 16, 1911, to September 30, 1911, at the rate of three-tenths of one cent for each 100 pounds transported. \* \* \*

But the principal contention of appellant is that the order of the commission fixing the rates and declaring the complainant entitled to reparation or refund was made in part upon evidence not produced before the commission at the hearing nor brought to the attention of the appellant, hence that due process of law was denied to the appellant within the rule of the case last cited. The findings and order of the commission are made at the foot of an opinion in which the commission after the manner of courts sets forth in apparent explanation or justification of its decision the grounds upon which the same rests. The appellant points to the following sentences as indicating that the commission considered such extraneous evidence: "But in this as in most cases, the principal basis for computing the reasonable rate is the cost of the service to the carrier, and this cost has been ascertained in the present case by the methods often explained in decisions of this commission. Considering the fact that the commodity involved is of comparatively low value in proportion to its weight, is transported in regular movements, and is subject to little risk in transit, and considering also the rather heavy loading of ice and the fact that no extra equipment of any kind is necessary in handling it, it is apparent that this commodity is entitled to a comparatively low rate. While the rate must necessarily be sufficient to cover the actual expense of the service, the traffic is of a kind that should not be expected to contribute as much in the way of interest upon the railway company's investment as does the average traffic on the line. An application of the principles just stated to the circumstances of this case seems to warrant the conclusion that the present rate of 2 cents per 100 pounds is a little higher than the petitioner should be required to pay. At the same time, the cost figures at hand do not at this time justify the commission in fixing the rate as low as 1.5 per 100 pounds, the figure at which it was placed by the railway company up to about 1905. When the movement and termi-

nal expenses of the railway company upon this traffic are properly adjusted to take account of the length of the haul and the other conditions peculiar to this traffic, it is found that a rate of 1.7 cents per 100 pounds is about fair as between the shipper and the carrier, and the establishment of such rate will be ordered."

This falls very short of saying that the commission acted without evidence or acted upon evidence of extrinsic facts or circumstances not legally before the commission at the hearing. On the contrary, the statement is that the cost figures were at hand and one of the bases, in fact the principal basis, for computing a reasonable rate, was the cost of the service to the carrier, which cost had been ascertained by methods often explained in decisions of the commission. Decisions here referred to are public records entitled to judicial notice (section 1797—37n) and are doubtless *Buell v. Railroad Co.*, 1 W. R. C. R. 324, see p. 340 et seq.; *Pulp & Paper Mfrs. v. Railroad Co.*, 2 W. R. C. R. 168; *Ringle v. Railroad Co.*, 7 W. R. C. R. 170. These show the complexity of the questions investigated, the methods of arriving at cost, and the bases of computation.

The railroad companies are required to report annually to the state board of assessments and in considerable detail (section 1215—5, Stats.), and this report constitutes a public document or record. In addition to this, all railroads are required to report in great detail to the Railroad Commission upon blanks prepared and sent out by said commission (sections 1797—18 to 1797—21), and these reports are made annually and comprise a volume of about 125 quarto pages each, are on file with the commission, and constitute public records or documents. Of the same character is the freight tariff made and filed by each railroad company. These annual reports contain all the necessary data from which the cost of transportation per ton mile or per train mile and the apportionment of terminal expenses may be computed with as much accuracy as it is possible to compute such cost. Space will not permit the elaboration of this report, but it may be said that for the entire system and for Wisconsin, separately, the total passenger revenue and the total freight revenue are separately stated. In like manner the total operating expenses and the account to which each class of items of this expense is chargeable is also set forth. The number of tons of freight earning revenue carried, the number of tons carried one mile, and the number of tons carried per mile of road, and the average haul are given, the average amount of receipts for each ton of freight and the average receipts per ton mile and per mile of road, the number of employes engaged in each kind of occupation and the wages of each group, the switching and terminal expenses, the different commodities carried and the tons of each and the percentage which each forms of the whole tonnage carried, and many other data. These reports and the tariffs of freight rates filed by the several railroad companies constitute a sufficient basis more accurate and thorough than the ordinary statistical bases for a statistical computation of the cost to

the railroad of any particular service such as that in question here. It is, of course, characteristic of all statistical computations that they deal with class frequencies, ratios and averages, and that slight errors may exist in the bases without materially affecting the result.

In this case, if there is any error in the bases, it was made by the appellant itself, for the commission had before it defendant's report covering the period in question. In such case the actual average cost of the same kind of service may also be arrived at by the comparative method from like reports of other railroads performing the like service. The method of ascertaining what is a reasonable rate by a computation of the cost of service is here aided and supplemented by a comparison with what it costs other roads to perform like services. We do not think it necessary that these public documents be formally offered in evidence before the Railroad Commission or certified up to the circuit court in every action brought to review an order of the commission. All parties know of their existence, the appellant itself furnished a report covering the period in question, the cost of the services in question was a fact peculiarly within the knowledge of the appellant if within the knowledge of any person, and the statute justly throws the burden of proof upon the appellant in the matter of showing that the rate fixed by the commission is unreasonable. The commission and the court may take judicial notice of the contents of these public records, and both parties are at liberty to present computations therefrom in argument at any stage of the litigation even in this court. \* \* \*<sup>41</sup>

<sup>41</sup> "It is to be observed that as to rates the statute does not permit the commission to act upon its own initiative, but that it must wait, so far as practical action is concerned, until a complaint has been made to it, in the manner provided by law, before it can appoint a hearing and make an order such as the statute contemplates. The use of the expression 'after a hearing' is conclusive that upon any such hearing the commission must, if it performs its duty, take into consideration all the facts upon which its action should be based, and judge of those facts in the light of principle and of legal rights." New York Public Service Commission (Second District) Report, 1907, I, p. 36.

"In matters like that in question the statute contemplates that the commission shall act upon due notice and hearing, and it here sufficiently appears from the report that after the hearing of November 16, 1911, the commission employed an expert who made investigations and laid the result thereof before the commission, and that no opportunity was afforded the defendants to examine the expert or to present evidence in rebuttal or to argue the case as it finally stood. And it sufficiently appears that the report of the expert was considered by the commission and aided them in arriving at their conclusions. So we think that the order was not made in pursuance of statutory authority." *Sabre v. Rutland R. Co.*, 86 Vt. 347, 354, 85 A. 693, 696 (1913).

See, also, as to the right of a railroad company to inspect tentative valuations made by the Interstate Commerce Commission, *United States ex rel. St. Louis S. W. R. Co. v. Interstate Commerce Commission*, 264 U. S. 64, 44 S. Ct. 294, 68 L. Ed. 565 (1924).



## SECTION 11.—REVOCATION OF LICENSES

PEOPLE, for Use of STATE BOARD OF HEALTH, v. McCOY.

Supreme Court of Illinois, 1888. 125 Ill. 289, 17 N. E. 786.

SCOTT, J. This suit was brought in the criminal court of Cook county, under and by virtue of the provisions of section 12 of the act of 1887 (Laws 1887, p. 228), to regulate the practice of medicine in this state, in the name of the people, for the use of the State Board of Health, against John C. McCoy, alias J. Cresap McCoy, to recover the statutory penalty imposed by that section for practicing medicine without a certificate from the State Board of Health. On the trial, the court found the issues for defendant and rendered judgment against plaintiff for costs. \* \* \*

It is said the state board, in regard to revoking certificates issued to physicians, must investigate, hear and determine certain questions, and to the extent it exercises such powers its functions are judicial. It is therefore claimed that the question whether a physician has been guilty of "unprofessional or dishonorable conduct" is a question of fact, the finding as to which, when submitted to the board, is final and conclusive, and is not open to review by other tribunals. The doctrine contended for finds support in the decision of this court in *People v. Dental Examiners*, 110 Ill. 180. Treating the record of the board, in the matter of revoking the certificate that had been issued to defendant, as having the force of a proceeding in its nature judicial on the part of the board in a case where it had jurisdiction of the subject-matter to be investigated, yet the present record is fatally defective, for the reason it is made to appear defendant had no notice of the proceedings proposed to be taken against him. The prosecution put defendant on the stand, and made him their own witness, and he distinctly stated, at their instance, that the notice found in the record was never in fact served upon him. The affidavit of service is not sufficient to overcome his testimony in that respect. It is contrary to the analogies of the law that a proceeding, in its nature judicial, should be obligatory and conclusive upon a person not a party thereto; otherwise a party might be deprived of important rights, with no opportunity to defend against wrongful accusations. (Whether the right to practice medicine or law is property, in the technical sense, it is a valuable franchise, and one of which a person ought not to be deprived, without being offered an opportunity, by timely notice, to defend it.) \* \* \*

The judgment will be affirmed.<sup>42</sup>

<sup>42</sup> Act 1877, § 9, did not expressly provide for notice to the person proceeded against before revoking the certificate to practice medicine. The present law does.

See *Century Digest*, Process, §§ 201-203. See, also, *Oshkosh v. State*, 59 Wis. 425, 18 N. E. 324 (1884); *State v. Schultz*, 11 Mont. 429, 28 Pac. 643 (1892).

PEOPLE *ex rel.* LODES *v.* DEPARTMENT OF HEALTH OF  
CITY OF NEW YORK.

Court of Appeals of New York, 1907. 189 N. Y. 187, 82 N. E. 187, 13 L. R.  
A. (N. S.) 894.

Appeal from Supreme Court, Appellate Division, Second Department.

Mandamus by the People of New York, on the relation of George Lodes, against the Department of Health of the City of New York, to compel the board of health of the respondent to rescind its action revoking permits issued to the relator to sell milk in the borough of Brooklyn. From an order of the Appellate Division (116 App. Div. 890, 102 N. Y. Supp. 1145), affirming an order of the Special Term (51 Misc. Rep. 190, 100 N. Y. Supp. 788), granting a peremptory writ, respondent appeals. Reversed, unless the relator within 20 days elects to demand an alternative writ, in which case proceedings should be remitted to the Special Term.

HAIGHT, J. On the 17th day of April, 1903, the board of health of the department of health of the city of New York issued to the relator, George Lodes, six permits to sell and deliver milk from wagons and from his store in the borough of Brooklyn, which permits were revoked by the board of health, without notice to him, on the 17th day of January, 1906. Thereupon the relator applied for a peremptory writ of mandamus to compel the board of health to rescind its action in revoking the permits, alleging that there was no public necessity for the revocation of the permits; that the action of the board was arbitrary and unreasonable, tyrannical and oppressive in the extreme, and beyond the power and authority conferred upon it by law. On the hearing of such application, the board of health presented affidavits showing that the relator, his wife, and the drivers of his wagons had been four times convicted of selling, or offering for sale, adulterated milk, and that their action in revoking his permits was based upon such repeated violations of the law, and that by reason thereof they deemed him an unfit person to traffic in milk. The Special Term granted the peremptory writ prayed for, and the affirmance of that order by the Appellate Division is now brought up for review.

The Sanitary Code of the city of New York, which was continued in force by the charter of the city (section 1172, c. 466, p. 499, Laws 1901), provides: "Section 56. No milk shall be received, held, kept, offered for sale or delivered in the city of New York without a permit, in writing, from the board of health and subject to the conditions thereof." The provisions of the Sanitary Code, alluded to, have been held to be reasonable and a valid exercise of the police powers, and violative of no provision of the Constitution, either state or federal. *People ex rel. Lieberman v. Vandecarr*, 175 N. Y. 440, 67 N. E. 913, 108 Am. St. Rep. 781, affirmed 199 U. S. 552, 26 Sup. Ct. 144, 50 L.

Ed. 305. It has also been held that the board of health has power to revoke permits to sell milk, notwithstanding no ordinance had been adopted by the board authorizing such revocation. *Metropolitan Milk & Cream Co. v. City of New York*, 113 App. Div. 377, 98 N. Y. Supp. 894, affirmed in this court 186 N. Y. 533, 78 N. E. 1107. These questions we regard as settled.

The only question remaining to be disposed of is as to whether the relator was entitled to notice and a hearing by the board of health before revoking his permits. The answer to this question may depend upon the soundness of the relator's contention that the permits issued to him were property, of which, under the Constitution, he cannot be deprived without due process of law. He maintains that he has established and built up a business of selling milk at his store and has a regular line of customers whom he supplies daily; that he has established a milk route over which his wagons are sent daily distributing milk to the inhabitants of the city in that locality; and that this established business has become property, of which he cannot be deprived. But the good will of his business, so established, must not be confounded with the permits granted to him to engage in that business. He was never licensed to sell impure and adulterated milk, and after he had obtained his permits to sell and undertook the securing of customers, he knew that he was engaging in a business which must be conducted under the supervision of the board of health of the city subject to the police powers of the state, and that such permits were subject to revocation. He knew that the permits contained no contract between the state, or the board of health, and himself, giving him any vested right to continue the business, and that it would become the duty of the board to revoke his license, in case he violated the statute, or the conditions under which it was granted.

Milk is an article of food extensively used by our inhabitants and is chiefly relied upon to support the lives of infant children. If impure or adulterated, or polluted with germs of dangerous or infectious diseases, its use becomes highly dangerous, and the health and welfare of the public demand speedy and, in some cases, instant prevention of its distribution to the people. While it is the duty of the board of health to watch and, through its inspectors, detect violations of the statute and the conditions imposed by it, it has been given no judicial power to hear, try, and determine such violations, but must act upon the information obtained by it through its own channels of inquiry. In *Cooley's Constitutional Limitations* (7th Ed.) p. 887, it is said that: "Dealers may also be compelled to take out a license, and the license may be refused to a person of bad reputation, or be taken away from a party detected in dishonest practices." [The court then cites, and quotes from, *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620, *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623, *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657, and *Matter of Lyman*, 160 N. Y. 96, 54 N. E. 577.]



We incline to the view that the authorities to which reference has been made are conclusive upon the subject; and, although the relator had established a business and secured customers under the permits granted to him, the permit itself cannot be treated as property in any legal or constitutional sense, but was a mere license revocable by the power that was authorized to issue it. The statute, as we have seen, has given the board of health no power to hear, try, or determine cases. Its duties are therefore not judicial, but executive or administrative, and at times must be exercised summarily, as was said in *Metropolitan Board of Health v. Heister*, 37 N. Y. 661: "The power to be exercised by this board upon the subjects in question is not judicial in its character. It falls more properly under the head of an administrative duty." The court in that case had under consideration the question of the abating of a nuisance, or the recovery of a penalty therefor, occasioned by the alleged maintenance of a slaughterhouse in a densely populated portion of the city in such a manner as to endanger the health of the inhabitants. But we see no reason why the power of the board of health in that case should differ from the powers of the board in this case. Each have reference to the preservation of the public health, and, if their powers are administrative in that case, they must be in this case. [The court then cites and quotes from *People ex rel. Copcutt v. Board of Health*, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522, ante, p. 143.] See, also, *People ex rel. Schau v. McWilliams*, 185 N. Y. 92, 77 N. E. 785, in which Chief Judge Cullen has recently reviewed the authorities upon the subject, pointing out the difference between judicial powers and the action of administrative or executive officers.

The powers of the members of the board of health being administrative merely, they can issue or revoke permits to sell milk in the exercise of their best judgment, upon or without notice, based upon such information as they may obtain through their own agencies, and their action is not subject to review either by appeal or by certiorari. *Child v. Bemus*, 17 R. I. 230, 21 Atl. 539, 12 L. R. A. 57; *State ex rel. Cont. Ins. Co. v. Secretary of State*, 40 Wis. 220; *Wallace v. Mayor, etc., of Reno*, 27 Nev. 71, 73 Pac. 528, 63 L. R. A. 337, 103 Am. St. Rep. 747. If, however, their action is arbitrary, tyrannical, and unreasonable, or is based upon false information, the relator may have a remedy through mandamus to right the wrong which he has suffered. If the relator can show that he and those acting for him have not been convicted of violating the statute and the conditions imposed in the granting of the permits, and that consequently he is a fit and proper person to engage in the sale and distribution of milk among the inhabitants of the city, then he would be entitled to the relief asked for. But if he desired to submit such evidence, he should have asked for an alternative rather than a peremptory writ. If, however, the charge of the board is true that he has been convicted of the offenses charged the number of times stated, the conclusion is irresistible that he was an

improper person to be intrusted with the permit of the city to dispense to the inhabitants of the city a food product that was liable, if adulterated, to endanger the health of the people.

It is now contended, however, that the members of the board of health are judicial officers and act as such by virtue of the provisions of section 1173 of the Greater New York charter. 3 Laws 1901, p. 500, c. 466. It will be necessary to consider the whole section, for we think the subsequent provisions indicate the intention and purpose of the former. It is as follows: "The actions, proceedings, authority, and orders of said board of health shall at all times be regarded as in their nature judicial, and be treated as *prima facie* just and legal. All meetings of said board shall in every suit and proceeding be taken to have been duly called and regularly held, and all orders and proceedings to have been duly authorized, unless the contrary be proved. All courts shall take judicial notice of the seal of said board and of the signature of its secretary and chief clerk." Were these provisions intended to change the character of the board of health from administrative to judicial officers? We think not. They do not state that the board shall act judicially, or that its orders shall be regarded and treated as the orders of a judge or court, but merely that they shall be regarded in their nature judicial, and that they shall be treated as *prima facie* just and legal, and that all orders and proceedings have been duly authorized. To our minds it is quite apparent that the legislative purpose and intent was to invest the orders and proceedings of the board of health with the presumption that they were duly authorized and were just and legal, and that it was not intended to change the members of the board from administrative to judicial officers.

These provisions have already been the subject of judicial consideration, with a result that accords with our views. In the case of *Golden v. Health Department of City of N. Y.*, 21 App. Div. 420, 421, 47 N. Y. Supp. 623, Justice Rumsey says: "It is quite true that it is provided that the action, proceedings, authority, and orders of the board of health shall at all times be regarded as in their nature judicial, and be treated as *prima facie* just and legal. This provision of the statute has been in existence for many years, but it has never been regarded as making the board of health a court whose orders are final and conclusive. Indeed, it makes no provision for any such thing. The statute prescribes the effect which shall be given to these orders, and that is that they shall be regarded as *prima facie* legal. Thus much was clearly within the power of the Legislature; and the statute imposes upon persons who question the orders of the board of health in such cases the duty of establishing that the facts upon which they are based do not exist, or that the orders themselves are beyond the authority given to the board by the law. Further than that the statute does not go."

*City of Buffalo v. Chadeayne*, 134 N. Y. 163, 31 N. E. 443, was an action to recover a penalty for an alleged violation of an ordinance

prohibiting the erection of a wooden building within the fire limits of the city. The common council had passed a resolution giving the defendant permission to erect such building. He thereupon entered upon the construction of the building and incurred liabilities for work and material and had a property interest in them. Thereafter the common council rescinded the permit, and after the defendant had completed the building the city brought action for a penalty. It was held that, after the defendant had entered upon the construction of the building pursuant to the permit, and had entered into contracts and incurred liabilities, he acquired a vested right of property therein of which he could not be deprived. This case is not in conflict with those to which we have referred, but rather is in accord therewith, and illustrates the difference that exists between permits under which a vested right may be acquired and those in which such rights do not vest. One is a permit to construct a building, and the other a permit to peddle milk. To the same effect is *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169, and *City of Lowell v. Archambault*, 189 Mass. 70, 75 N. E. 65, 1 L. R. A. (N. S.) 458.

The order should be reversed, and the application for a mandamus denied, with costs in all courts, unless the relator within 20 days elects to demand an alternative writ, in which case the proceedings should be remitted to the Special Term, and the costs should abide the final award of costs.

VANN, J. (dissenting). If the order revoking the license of the relator was an administrative act, no notice to him was required; but, if it was an act done in the exercise of judicial power, notice and an opportunity to be heard were essential before he could be deprived of the right to carry on a lawful business. The Greater New York charter provides that: "The actions, proceedings, authority and orders of said board of health shall be at all times regarded as in their nature judicial and be treated as *prima facie* just and legal." Laws 1901, p. 500, c. 466, § 1173. While it is difficult to see how all acts of the board of health can be "in their nature judicial," the Legislature had the right to provide that they should be so regarded, and in view of its express command I fail to see how we can hold that the order of revocation was an administrative act. Notice was given in the only case involving the power to revoke that has been before us prior to the one now under consideration. *Metropolitan Milk & Cream Co. v. City of New York*, 113 App. Div. 377, 98 N. Y. Supp. 894; 186 N. Y. 533, 78 N. E. 1107. While summary action is often necessary in cases affecting the public health, still the danger from delay caused by giving short notice is less than the danger that may arise from action with no notice at all. The respondent should at least have had an opportunity to raise an issue as to whether he had ever been convicted by a court of competent jurisdiction of violating the Sanitary Code, or to show that any judgment of conviction had been reversed or set aside.



Moreover, a license under the police power, as distinguished from the taxing power, involves the right to regulate, but not to prohibit, and it cannot be exercised capriciously or arbitrarily. As the right to revoke is not expressly conferred, but is implied from the right to grant, the rule against arbitrary or capricious action applies with equal force to the revocation of licenses. One of the most effective safeguards against the arbitrary acts of public officials is an opportunity to be heard. The revocation of the respondent's license involved the destruction of his business, which was useful, legitimate, and profitable. Since the power to revoke is not expressly given, but is implied from the power to grant, I think the law also implies that notice must be given before an act can be done which involves such serious loss to the licensee. This involves the conclusion that the revocation of such a license as the one in question is in its essence judicial, independent of the statutory requirement that it shall be so regarded. I vote to affirm.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HISCOCK, and CHASE, JJ., concur with HAIGHT, J. VANN, J., reads dissenting opinion.<sup>43</sup>

### STATE v. LAMOS.

Supreme Court of Maine, 1846. 26 Me. 258.

TENNEY, J. The defendant is charged in the indictment with the offense of presuming to be and of being a common innholder, between the 1st day of June and the time of finding the bill at the term of the court holden in October, 1843, without being licensed therefor according to law, and without being duly authorized therefor. It was admitted by the defendant that he carried on the business of a common innholder as alleged in the indictment, and by the prosecuting officer that he was duly licensed as such for the period during which the offense was alleged to have been committed, with the restriction not to sell spirituous liquors. But it was insisted by the latter that the defendant's license was legally revoked on August 5, 1843.

The defendant not being charged with any other offense than that of being a common innholder without license, the correctness of the instructions to the jury, that the evidence authorized a conviction, must depend upon the legal revocation of that license. The town officers, who are authorized to grant a license, are empowered also to revoke it, whenever any instance of a breach of the bond required by Rev. St. c. 36, § 2, shall have come to their knowledge, and after complaint, notice to the party complained of, and a hearing thereon. Chapter 36, § 15.

<sup>43</sup> As to licenses revocable at pleasure, see *Commonwealth v. Kinsley*, 133 Mass. 578 (1882); *Vincent v. Seattle*, 115 Wash. 475, 197 P. 618 (1921). As to licenses required to be revoked upon conviction, see *Martin v. State*, 23 Neb. 371, 36 N. W. 554 (1888).

The power given by the section referred to, to the board, is important, and its exercise may materially affect the interests of those against whom complaints may be made. Their jurisdiction, like that of all inferior magistrates, must appear affirmatively, and cannot be presumed, or inferred. The authority to give a hearing, and to revoke a license, is not conferred without a complaint, and a notice to the party complained of.

It is not necessary that the complaint should be in writing, signed and sworn to as the law requires in complaints in criminal proceedings before a magistrate, to authorize him to issue a warrant; neither is it indispensable that it should be signed by any one; but the language used in the statute implies that the word "complaint" is to be understood in its legal sense.

A breach of the bond of a person licensed may come to the knowledge of the board. This alone is not sufficient to give a hearing after notice; but a complaint is necessary. The Legislature could not have intended to have made a distinction between simple information of the breach, and that information given verbally to the board, by way of complaint. Such would be senseless. But it was evidently their purpose that after the fact of a breach should become known to them, before they could give the notice to the person accused of having committed it, and proceed to a hearing, the complaint should be in writing and contain an allegation of the charges, with specifications, and the time when the breach took place. Of all these the party complained of was entitled to reasonable notice, that he might know particularly what he was called upon to answer, and have opportunity to produce proof that the charges were unfounded. Without this, there would be a looseness which would be perfectly anomalous in all proceedings of the same general character. There would be an uncertainty whether the evidence adduced at the hearing had relation to the charges of which he had notice, or others, which were distinct therefrom. If the license should be revoked, it could not appear whether it was upon satisfactory proof of the charges alleged, when no record or document existed to show what they were.

The order revoking the defendant's license is in writing, and it is therein stated that the undersigned, being a major part of the licensing board, after notifying him of their intention so to do, gave him a hearing on the charges preferred against him, and being satisfied, beyond a reasonable doubt, that he has failed to keep the Wadleigh House, according to the restrictions and conditions of his bond and license, did revoke said license, rendering it of no effect, informing him at the same time of the fact. No written complaint or copy thereof was introduced at the trial as the basis of the proceedings of the board, nor was there evidence that any was before them at the hearing. The order of revocation was introduced without objection, but if it contained no statement showing a jurisdiction in the board, it certainly was insufficient for that purpose; and it contains nothing

which indicates that they proceeded under a written complaint. It does not state what charges were preferred against the defendant; and they could have jurisdiction only on complaint of a charge that the condition in the bond, which the law authorized them to insert, had been broken. *Crosby v. Snow et al.*, 16 Me. 121.

The board found the defendant guilty of not keeping the Wadleigh House according to the conditions and restrictions of his bond and license, and for that cause his license was revoked. Whether this was the charge preferred against him or not, or whether the conditions and restrictions in the bond and license, which they found he failed to observe were those which could be legally required, even if written complaint was not necessary, no proof was adduced to show.

Exceptions sustained.<sup>44</sup>

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BLUNT v. SHEPARDSON et al.

Supreme Court of Illinois, 1918. 286 Ill. 84, 121 N. E. 263.

Certiorari by Arthur L. Blunt against Francis W. Shepardson and others. Writ denied, and petitioner appeals. Reversed and remanded, with directions.

DUNN, J. On March 14, 1918, Arthur L. Blunt filed a petition in the circuit court of Cook county alleging that he was, and had been for 25 years, a resident of the city of Chicago, in Cook county; that on April 3, 1888, a license was issued to him by the state board of health authorizing him to practice medicine in this state under the provisions of the Medical Practice Act then in force; that from that time until February 7, 1918, he continuously practiced medicine in the city of Chicago; that on January 10, 1918, he received a letter signed by Francis W. Shepardson, director of registration and education, under the seal of the department, addressed to him, as follows:

"Sir—On account of reports which have reached this department of unprofessional conduct on your part, a hearing is hereby appointed for Friday, January 18, 1918, at eleven o'clock, in room 1201, People's Life Insurance Building, Randolph and Wells streets, Chicago, at which time you will be given opportunity to show cause why your license to practice medicine in the state of Illinois should not be revoked."

He went to the place mentioned at the hour stated and there asked of the clerk in charge of the outer office what definite charges had been made against him. The clerk answered that he could give no information on the matter but that information would be given to the pe-

<sup>44</sup> See, also, *State v. Kellogg*, 14 Mont. 426, 36 Pac. 957 (1894); *Lillienfeld's Case*, 92 Va. 818, 23 S. E. 882 (1896); *State ex rel. Sullivan v. Tomah*, 80 Wis. 198, 49 N. W. 753 (1891); *Pehrson v. Ephraim City*, 14 Utah, 147, 46 Pac. 657 (1896); *Czarra v. Board of Medical Supervisors*, 24 App. D. C. 251 (1904).



tioner when he was called into the private office of the director of the department of registration and education. While waiting, the petitioner inquired of F. C. Dodds, the superintendent of registration, what definite charges had been made against the petitioner and on what charges he was to be given a hearing, but was answered that the information on the matter would be given to him after he had been called into the inner office. Petitioner soon afterward was called and entered the inner office, where he found six or seven persons whose names were and are unknown to him, except that one was F. C. Dodds and another Francis W. Shepardson. After petitioner was seated Shepardson said to him:

"Dr. Blunt, it has been reported to this board that on December 7, 1917, you were found guilty in the federal court for this district of violating the Harrison Drug Act and were sentenced to five years in the penitentiary and to pay a fine of \$12,000. What have you to say regarding this charge?"

Petitioner replied that a verdict had been rendered and sentence imposed by the court, as stated, but that he had applied for and been granted a writ of error in the United States Circuit Court of Appeals, and an order of supersedeas had been entered, and that the matter was now pending in the Circuit Court of Appeals; that he had not violated any law of the state of Illinois and felt assured that upon a hearing in the United States Circuit Court of Appeals the verdict of the jury in that matter would be set aside and that the court would find and declare the petitioner had not violated any laws of the United States. Thereupon a few casual inquiries were made of petitioner regarding his practice of medicine in Chicago, but no charges of any kind were presented other than as stated. The petitioner did not at any time receive any written statement advising him of the charges against him, and the foregoing statement constitutes the entire facts connected with the pretended hearing given him by the department of registration and education. This pretended hearing lasted only a few minutes, and petitioner was thereupon directed to depart, and the statement was made that the matter would be taken under advisement. The petitioner heard nothing further of the matter until February 7, 1918, when he received the following notice:

"Dr. Arthur L. Blunt, 9 West Harrison Street, Chicago, Illinois—Sir: Under the authority vested in me by section 4 of the Civil Administrative Code of the State of Illinois, and in accordance with the provisions of section 18 of the Medical Practice Act of Illinois, license No. 8188, issued to you by the state board of health on April 3, 1888, entitling you to practice medicine and surgery in the state of Illinois, is hereby formally revoked. Yours very truly, Francis W. Shepardson, Director." [Seal.]

The petition further states that in attempting to revoke the petitioner's license to practice medicine the department of registration and education and Francis W. Shepardson, director thereof, acted without au-

thority, illegally, and without due process of law, and sets forth the claim of the petitioner in regard to the unconstitutionality of certain provisions of the Civil Administrative Code of Illinois (Hurd's Rev. St. 1917, c. 241½), and certain sections thereof in regard to the power of the department of registration and education, and also the unconstitutionality of section 18 of the Medical Practice Act (Hurd's Rev. St. 1917, c. 91, § 17e), and states various reasons why the attempted revocation of petitioner's license was unjust, unlawful, and without jurisdiction. Petitioner shows that the statute makes no provision for appealing or for a writ of error, and that there is no method other than by certiorari for the review of the action taken against him, and prays for the issuance of a writ of certiorari against the director of registration and education, the assistant director, and the superintendent of registration. Respondents were served with notice of the petition, and on March 26th the cause was heard upon the application of the petitioner for a writ of certiorari, but the court denied the writ on the ground that it appeared from the petition that the department of registration and education had jurisdiction over the petitioner and the matters complained of in the petition and had proceeded regularly and in a manner prescribed by law, and that the petitioner failed to make an application for rehearing and therefore denied the petition. The petitioner has appealed to this court on the ground that constitutional questions are involved.

The briefs argue the questions of the constitutionality of certain provisions of the Civil Administrative Code and the Medical Practice Act, the jurisdiction of the department of registration and education, and the regularity of the proceedings. We do not deem it proper to decide these questions upon the petition for a writ of certiorari without having the record of the proceeding complained of before us. The power given by the Civil Administrative Code to the department of registration and education to revoke a license to practice medicine is not arbitrary. The department cannot act except for cause shown, upon notice and hearing and with an opportunity to defend. *Klafter v. Examiners of Architects*, 259 Ill. 15, 102 N. E. 193, 46 L. R. A. (N. S.) 532, Ann. Cas. 1914B, 1221; *People v. Apfelbaum*, 251 Ill. 18, 95 N. E. 995; *People v. McCoy*, 125 Ill. 289, 17 N. E. 786. Its power to revoke the license of a medical practitioner cannot be exercised except upon the action and report in writing of a majority of the five reputable physicians licensed to practice medicine and surgery in this state designated from time to time by the director of registration and education for that purpose. According to the petition, no such report in writing was ever made; at least, no notice was ever given to the petitioner. He was simply advised by the letter that reports of unprofessional conduct on his part had reached the board and told verbally that it had been reported to the board that he had been found guilty of violating the Harrison Drug Act. There was no charge, no hearing, and the letter announcing the revocation of his license did not state for which of the reasons mentioned in the Medical Practice Act his li-

cense had been revoked or whether for any or no reason. The evidence of the granting and revocation of licenses cannot rest in parol. The record must be preserved, and it is essential to the validity of an order revoking a license that it shall show the facts essential to the jurisdiction of the department. On the showing made by the petition the writ of certiorari should have been awarded to bring before the court the record of the proceedings of the department of registration and education.

The judgment is reversed, and the cause remanded, with directions to the circuit court to award a writ of certiorari in accordance with the prayer of the petition.

Reversed and remanded, with directions.<sup>45</sup>

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5 " STOCK v. CENTRAL MIDWIVES BOARD.

High Court of Justice, King's Bench Division. [1915] 3 K. B. 756.

Appeal by Mrs. Lucy Henrietta Stock, a midwife, against a decision of the Central Midwives Board removing her name from the roll of midwives by virtue of the power conferred upon the Board by section 3, clause V, of the Midwives Act, 1902, upon the ground that she had been guilty of misconduct within the meaning of the section, the misconduct alleged being that she had been and still was cohabiting with a man not her husband.

LORD READING, C. J. This is an appeal by Mrs. Stock, a married woman, against a decision of the Central Midwives Board removing her name from the roll of midwives. [Having stated the facts his Lordship continued:]

The Board met in her absence, as they were entitled to do under rule 8, and had before them a report of a relieving officer containing statements which were inaccurate with regard to her and which certainly cannot be said to have had no influence upon the Board in the decision at which they arrived that her name must be removed from the roll of midwives. They accordingly removed her name, which they had the power to do under section 3, of the Midwives Act, 1902. That statute was passed for the better training of midwives and to regulate their practice and one of its objects was to place midwives under an administrative board composed of persons of eminence, repute, and experience in the treatment of persons who are confined of children and, consequently, who require the services of midwives. The powers of the Board are defined by the act and they have power (amongst other things) to make rules subject to approval by the Privy Council. They accordingly made rules which were approved by the Privy Council. There is no appeal from any decision of the Central Midwives Board

<sup>45</sup> See regulation of procedure in revoking professional licenses by Laws of Illinois of 1927, p. 858.



except under section 4 of the Act of 1902. It is not necessary for our decision in the present case, in view of the conclusion at which we have arrived to determine whether the right of appeal to this court given by that section is limited, or whether there is a full right of appeal by way of rehearing, but as the point has been argued before us and it was left open in *In re Feldmann*, 71 J. P. 269, I desire to say that in my view the right of appeal thus given is as full as is given by any statute which confers a right of appeal to this court, and that rules 19 and 20 of Order LIX of the rules of the Supreme Court, 1883, make it plain that this court has power to hear further evidence by affidavit, or oral evidence if it so chooses. The object of the Legislature was to enable the Board to administer the affairs regulating the practice of midwives and to give them the unrestricted right to administer those affairs subject to this one right of appeal; and in my view, when a case of this kind is brought to this court, it is the duty of the court to see that justice is done, and, in the absence of restricting or hampering words in the section, the court must inquire into all the circumstances, and is absolutely unfettered in any investigation which it may think right to make in order to ascertain the facts.

Three points have been taken by Mr. Eales, who has argued with ability and moderation. The first was that, assuming the facts to be as found by the Board, namely, that Mrs. Stock was a married woman and was cohabiting with Hill in the house at Longford, such conduct is not misconduct within the meaning of the statute; that the words used in clause V of section 3 of the act, which enumerates the duties and powers of the Board "to decide upon the removal from the roll of the name of any midwife for disobeying the rules and regulations \* \* \* or for other misconduct," do not give to the Board the right to determine that a person on the roll shall be removed because she is living what the Board may think an immoral life, that is, immoral in the sense that as a married woman she is cohabiting with a man not her husband. It is right to say that there is no other suggestion of any sort or kind made against this woman's character and that whatever charge is made against her is limited entirely to the facts relating to what she did after the very unhappy married life which she seems to have led. I only desire to say that in my view the misconduct dealt with by the section is not limited to misconduct in the discharge of the duties of a midwife. If it is misconduct in the opinion of the Board which tends to unfit her for the discharge of the duties of a midwife, then the Board has the right to treat it as misconduct under the statute and to visit it with the penalties which in their opinion it deserves. Further, I do not wish it to be thought that if the facts and the circumstances of this case upon a true view of them justified the Board in coming to the conclusion at which they arrived with regard to the life which Mrs. Stock was living, they would not be entitled, if they thought fit, to decide that she was leading a life which would justify them in removing her name from the roll. Each case,

of course, must be dealt with on its own circumstances. It seems to me that no persons can be more fitted to determine a matter of this kind than a Board constituted as this Board must, under the statute, be constituted.

The second point taken by Mr. Eales was that the Board wrongly and in breach of the rules which they themselves had framed and which had been approved by the Privy Council admitted evidence against the appellant.

Thirdly, he took the point that the evidence which they admitted, and which was heard in her absence, contained inaccurate statements which must have had influence upon the decision of the Board.

Now it is quite clear that under rule 2 the Board ought to have had the report of the relieving officer verified by a statutory declaration, and that a copy of it ought to have been supplied free of cost to the appellant before the day fixed for the meeting of the Board at which they were to deal with the case or for the adjournment thereof. The report received from the relieving officer by the Board was not verified by statutory declaration. No copy of that statutory declaration, or, indeed, of the report, was submitted to Mrs. Stock before the adjourned hearing in October. That is in itself a serious matter. Where, as in the present case, the Board was sitting as a judicial tribunal and had to decide whether the name of a person was to be removed from the roll, it is essential that the Board should strictly comply with its own rules. A person in the position of Mrs. Stock would be quite justified in thinking that there was nothing further to be said against her, that no further evidence was going to be brought forward except such as would represent what she knew to be the true statement of affairs and which she did not fear. If there was any such evidence to be adduced against her a copy of it ought to have been sent to her, and in cases of this character, if this court comes to the conclusion that evidence has been used in breach of the rules, and also without any notification of it to the accused person, in the present case it was used in breach of the rules, first, because it had not been verified on oath or by a statutory declaration; secondly, because the copy of the statutory declaration was not sent to the appellant, that in itself, in my judgment, ought to be fatal in a case of this character. A woman's name ought not to be removed from the roll in consequence of a decision of the Board against her, unless that decision is arrived at in strict compliance with the rules framed by the Board.

But the present case does not rest there. It appears from the facts which we have now before us that the statements irregularly admitted were inaccurate and that if they were accepted by the Board as accurate they reflected upon the veracity of Mrs. Stock in the statements she had made to the Board when they had heard her evidence, and in such a way as may very well have led the Board to the conclusion that Mrs. Stock's statement made on oath that she was not cohabiting with this man was not worthy of credence. I can quite well understand the

Board coming to the conclusion that, as she had misled them in a number of statements she had made to them on oath, they were not inclined to place much reliance upon her statement as to the question itself which was being investigated before them. One cannot but think that if the Board had had the true statement before them, that all that she had told them about her past life was quite true, and proper examination and evidence would have disclosed the fact which is now disclosed to us, that she was an ill-treated person who had suffered from the treatment of her husband, and had been left to look after the two children without the assistance of the husband, and that she truly said that the custody of the two children was given to her, they might have arrived at a different conclusion. They had not that evidence before them, and dealt with evidence irregularly admitted before them and came to a conclusion upon it. In my judgment when the true facts are arrived at, as they have been in this court beyond all question, and when it is therefore known that the evidence given in her absence before the Board was inaccurate evidence reflecting upon her statements, that knowledge is another reason for coming to the conclusion that the removal of her name from the roll cannot be supported. I only desire to add that, having had the advantage of having further evidence brought before us than was before the Board, and also of hearing the case argued and discussed in a way it was not discussed before the Board, we come to the conclusion on the material presented to us that the order of the Board removing her name from the roll cannot be supported, and that this appeal must succeed.

*5 - my appeal for P*

#### LILLIENFELD v. COMMONWEALTH.

Supreme Court of Appeals of Virginia, 1896. 92 Va. 818, 23 S. E. 882.

Appeal from corporation court of Charlottesville.

Proceedings by the Commonwealth against T. J. Lillienfeld to revoke defendant's liquor license. From a judgment revoking the license, defendant appeals. Affirmed.

RIELY, J. \* \* \* The proceeding to revoke the license of the plaintiff in error to sell liquor was taken by the court of its own motion, under section 560 of the Code, which is as follows: "Upon the motion of the attorney for the commonwealth for the county or city, or of any other person, after ten days' notice to any person or firm licensed to sell liquors or any other thing, the granting of whose license was based upon the certificate of a court, the court which granted the certificate may revoke the license;" and the order of the court initiating the proceeding was in the following words: "It is ordered by the court that a notice be issued against F. J. Lillienfeld to show cause, if any he can, why the bar-room and retail-liquor license under which he is doing business should not be revoked for selling and caus-



ing to be sold to minors whisky, wine, and beer." Upon the hearing of the matter, Lillienfeld, by his counsel, moved the court to quash the notice upon the ground that it was not sufficiently specific, which motion the court overruled; and this constitutes the first assignment of error.

The order of the court, which was duly served upon the defendant, set forth plainly the ground of the proceeding—the sale of liquor to minors. It apprised him of the charge against his conduct of the business under his license. The statute does not provide, in terms, that the ground upon which the revocation of the license is or will be asked shall be set forth in the notice or otherwise. It is sufficient to state the charge or charges in general terms, if stated with sufficient certainty to enable the person or firm whose license it is sought to revoke to understand the ground upon which the revocation will be asked. This was done in this case. The proceeding is a summary one; and, as was said by Judge Lewis in *Cherry v. Com.*, 78 Va. 375, 378, "it was manifestly not the intention of the Legislature to require in such proceedings the application of the strict and technical rules which apply to indictments and other forms of accusation in criminal prosecutions." There is no substantial difference between the notice given in this case and the notice given in the case of *Cherry v. Com.*, supra, or in the case of *Davis v. Com.*, 75 Va. 944, in both of which cases the notice was held to be sufficient.

It is also alleged as error that the court admitted as evidence, over the objection of the defendant, 19 indictments which had been found against him by its grand jury for selling liquor to minors and were then pending in the court for trial; and also in receiving the testimony of Charles Wilkins that he had purchased intoxicating liquors of the defendant at his bar-room within the preceding 12 months, but prior to May 1, 1895, when his license took effect. In this there was no error. In a proceeding of this kind, the whole matter is heard and determined by the court, and it is not confined to the strict rules of evidence which obtain upon the trial of an issue before a jury, but the doors of evidence are and should be thrown open, that the court may be satisfied whether or not it has intrusted the sale of liquor to an unfit person, and the privilege of the license been abused or the law violated. The relevancy and materiality of the evidence, and the weight to be given to it, are matters for the consideration of the court, when it comes to determine the case. Even in certain criminal prosecutions involving the life or liberty of the accused, whenever the intent or guilty knowledge is a material ingredient in the issue of the case, evidence of other acts of the accused of a similar nature tending to establish such intent or knowledge is admissible as evidence, if not too far removed; and what are the limits as to the time and circumstances is for the court, in its discretion, to determine. *Trogon's Case*, 31 Grat. 863.

Upon a review of the whole evidence, as certified by the court, we are of opinion that the discretion of the court was properly exer-

cised in revoking the license of the plaintiff in error. When the license was granted, he, along with the other applicants for liquor license, was notified and warned by the court that if he sold or allowed liquor to be unlawfully sold to minors his license would be revoked. The evidence discloses that liquor was sold in his bar-room, in a number of instances, and, if he did not himself sell it, he did not exercise due oversight and vigilance to see that it was not done by his bar tender. It further appears that, even after the large batch of indictments for selling liquor to minors had been found against him, he still retained as his bar tender the man who is proved to have freely and without inquiry sold liquor to minors. The protection of minors against the terrible evils which ensue from contracting in early life the habit of indulgence in strong drink, and the happiness of parents, as well as the good of society in general, require that this dangerous traffic in ardent spirits should be carefully guarded, and not placed or suffered to remain in the hands of men who will disregard the law, or allow it to be disregarded by their employés, or knowingly retain in their service as bar tenders persons who violate the law.

Upon a consideration of the whole case, the court is of opinion that the corporation court did not err in revoking the license of the plaintiff in error, and that its judgment should be affirmed.<sup>46</sup>

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## SECTION 12.—GRANT OR REFUSAL OF LICENSES

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### UNITED STATES ex rel. ROOP v. DOUGLASS.

Supreme Court of District of Columbia, 1890. 19 D. C. 99.

Hearing in the first instance in General Term, on a return to a petition for mandamus to the Commissioners of the District of Columbia commanding them to issue or cause to be issued to the relators a retail liquor license. Writ refused.

JAMES, J. \* \* \* It was next objected that, notwithstanding a decision by one having discretionary power is conclusive when it is the consequence of a proper examination, it is not so when the examination appears to have been improperly conducted, and that, as a matter of fact, the examination in this case was not conducted properly or lawfully.

It appears by the return that the respondents received, as aids in

<sup>46</sup> See, also, *Traer v. State Board of Medical Examiners*, 106 Iowa, 559, 76 N. W. 833 (1898). But see *People ex rel. Silkens v. McGlyn*, 62 Hun, 237, 16 N. Y. Supp. 736 (1891), no proof other than character and standing of complainants.

See, also, *State ex rel. Sullivan v. Tomah*, 80 Wis. 198, 49 N. W. 753 (1891). A licensee duly notified may be proceeded against in his absence. *Com. v. Wall*, 145 Mass. 216, 13 N. E. 486 (1887).

forming their judgment, the unsworn reports of the police officers, and by the uncontradicted averments of the petition that they denied the petitioners a rehearing as to the truth of these reports. The methods of the respondents are impeached on the ground, apparently, that they were arbitrary in excluding a formal contest. To what methods, then, were the Commissioners limited? The interests and wants of the public, and not any pre-existing right of the petitioners, were the subjects which they were charged to ascertain, when application was made for license. Therefore, their mode of inquiry, and of satisfying their own judgments, was not subject to the rules which apply to the ascertainment of disputed private rights.

As no mode of inquiry is prescribed by the statute, the Commissioners are, by implication, authorized to adopt any that may reasonably be used in attaining the end in view. They were the head of a police force, which it was their duty to employ in watching over good order and preventing crime. The facts which might determine their approval or disapproval of a license, such as the assembling of disorderly persons, were the very matters which it was the duty of their subordinate officers to observe. It was not only reasonable, then, that they should derive information from that source, in aid of their executive discretion, but it may even be said to be an intendment of law, in every system of executive discretion, that the executive head may act upon mere information derived from his accountable subordinates.

This difference between an inquiry into disputed private rights and an inquiry intended simply to ascertain the interests of the public was considered and well stated in Raudenbusch's Appeal, 120 Pa. 342, 14 Atl. 150. Mr. Justice Paxson, speaking for the court, there said: "The law of the land has decided that licenses shall be granted to some extent, and has imposed the duty upon the court [of sessions] of ascertaining the instances in which the license shall be granted. In order to perform this duty properly, the act of assembly has provided means by which the conscience of the court may be informed as to the facts. It may hear petitions, or remonstrances, or witnesses; and we have no doubt the court may in some instances act upon its own knowledge. The mere appearance of an applicant for license, when he comes to the bar of the court, may be sufficient to satisfy the judge that he is not a fit person to keep a public house. The judge is not bound to grant a license to a man whom he knows to be a drunkard or thief, or has actual knowledge that his house is not necessary for the public accommodation. The object of evidence in such cases is to inform the conscience of the court, so that it can act intelligently and justly in the performance of a public duty. Whilst the act of deciding in such cases is quasi judicial, the difference between the granting and withholding of a license and the decision of a question between parties to a private litigation is manifest. Neither the petitioner nor any other person in this state has any property in the right to sell liquor."

The same kind of objection as in this case was made in *King v. Bishop of London*, 15 East, 117, where the respondent had refused to



license a lecturer. Lord Ellenborough there said: "It has been urged, however (and much stress was laid upon it at the argument), that it was the duty of the bishop to have instituted his inquiry upon the subject, in the manner and by the means usually adopted in courts of law; that is, by the formal production of the charges made against the applicant in a judicial course, and by a public and solemn hearing of the several parties, their proofs and witnesses. But, in the first place, what power has the bishop to compel the attendance of parties and witnesses? What power has he to administer an oath, or what word is there in the act of Parliament that prescribes the mode by which he shall attain a conscientious satisfaction on the subject? It only requires him first to approve, that is before he licenses; and in so doing it virtually requires him to exercise his conscience, duly informed, upon the subject, to do which he must duly, impartially, and effectually inquire, examine, deliberate, and decide."

The principle recognized in both of the cases referred to is that, inasmuch as the object of evidence in such examinations is merely to inform the conscience and judgment of the officer, such evidence may be taken in any way that is reasonably sufficient for that purpose. The officer is not governed by the rules of litigious evidence, and his decisions are not to be deemed arbitrary merely because they are founded upon information which a court would hold not to be evidence at all.

We not only adhere, then, to the opinion expressed in *Manion's Case*, 6 Mackey, 409, that the Commissioners have full discretion in the matter of retail liquor licenses, but we hold that they may conduct their inquiries by what may be called executive methods. \* \* \* 47

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#### GAGE v. CENSORS OF NEW HAMPSHIRE ECLECTIC MEDICAL SOCIETY.

Supreme Court of New Hampshire, 1884. 63 N. H. 92, 56 Am. Rep. 492.

Petition for a writ of mandamus. Facts found by a referee.

SMITH, J. The petitioner alleges that having pursued the prescribed course of study, and having upon due examination been graduated from the Eclectic Medical College of the city of New York, a legally chartered school authorized to confer degrees in medicine and surgery, and having received a diploma from said college, he presented himself before the defendants, a board of censors of the New Hampshire Eclectic Medical Society, January 4, 1882, and made application to the board for a license to practice medicine, surgery, and midwifery, in this state, representing that he had pursued the prescribed course of study and graduated from said college, and produced his diploma, and offered himself for such examination as the defendants might desire to make; that the defendants refused his application, declined to give

<sup>47</sup> Compare *Queen v. Licensing Justices*, 14 Q. B. Div. 584 (1885); *Reg. v. Bartlett*, 49 J. P. 772 (1885).

him a hearing, and refused to grant him a license. The petitioner prays for a writ of mandamus commanding the defendants to issue to him a license to practice medicine, surgery, and midwifery, in this state, and for further relief.

The defendants answer, admitting that they are the board of censors of the New Hampshire Eclectic Medical Society. They deny that the petitioner pursued the prescribed course of study, or that he was graduated upon due examination from said medical college, or that the college was legally chartered or authorized to confer degrees in medicine and surgery, or that the petitioner had a regular and proper degree from the college as alleged. They admit the other allegations of the petition, but say that the reason for their refusal to issue a license to the petitioner was because it clearly appeared to and was understood by them that the petitioner was disqualified and unfit to practice medicine, surgery, and midwifery, that he was unworthy of public confidence, and that it was clearly apparent to them that if a license was granted it would be their duty to revoke such license immediately for the reasons stated.

The referee finds that the petitioner graduated from the Eclectic Medical College of New York City, a medical school authorized by the laws of New York to confer degrees in medicine and surgery; that he received a diploma from the college, March 4, 1880, after having pursued the prescribed course of study and upon due examination; that he applied to the defendants January 4, 1882, for a license, and offered his diploma as evidence of his graduation; that the defendants refused to grant the petitioner a license, or to examine his diploma, or to examine him as to his qualifications; and that they put their refusal mainly upon the ground that the petitioner is not worthy of public confidence.

The statute requires every medical society, organized under the laws of this state, to elect a board of censors consisting of three members. Authority is conferred upon the board to examine and license persons to practice medicine, surgery, or midwifery. It is made the duty of the board to issue licenses without examination to all persons who furnish evidence by diploma from some medical school authorized to confer degrees in medicine and surgery, when the board is satisfied that the person presenting such diploma has obtained it after pursuing some prescribed course of study and upon due examination. The board has power, upon due notice and hearing, to revoke any license granted by it, when improperly obtained, or when the holder has, by conviction for crime or from any other cause, ceased to be worthy of public confidence. Gen. Laws, c. 132, § 2. The defendants allege as a reason for refusing a license to the petitioner that he is not "worthy of public confidence," and claim the right under the statute to refuse to issue a license if satisfied that either of the causes exists which authorize them to revoke it.

The object of the statute is protection to the public from incompetent and unworthy physicians and surgeons. Two classes of persons

are mentioned in the statute to whom a license to practice medicine, etc., may be issued—those who have and those who have not received a diploma from a medical school authorized to confer degrees. To the latter class the license is issued upon examination; to the former class, without examination. Authority to examine and license, as expressed in the statute, means authority to license, when, upon examination of the candidate as to his medical education, skill, and experience, the censors are satisfied that he possesses the necessary qualifications for the important and responsible occupation of a medical practitioner. When the candidate has received a diploma from a medical school, he has only to satisfy the board that it was conferred by a school authorized to confer degrees in medicine and surgery, and that it was conferred after he had pursued the prescribed course of study, and upon due examination by the authorities of the school. The statute makes such a diploma conclusive evidence to the censors that he possesses the requisite medical qualifications to practice medicine, surgery, and midwifery. Hence the provision that he shall receive a license without examination; that is, without examination as to his medical qualifications.

The statute also contemplates that the exigency may arise when the holder of a medical license may become, or may prove to have been, unfit or unqualified to practice medicine, and for that reason that his license should be revoked. The license is in effect a certificate that the holder possesses the necessary medical and other qualifications. The license may be revoked when it was improperly obtained, or when the holder has, by conviction for crime or from any other cause, ceased to be worthy of public confidence. Character, no less than medical education, skill, and experience, is, within the meaning of the statute, a qualification for a competent physician or surgeon. One who does not possess the requisite qualifications cannot be worthy of public confidence. *Barrows v. Mass. Med. Soc.*, 12 Cush. (Mass.) 402, 409; *Rex v. Dr. Askew et al.*, Censors, etc., 4 Burr. 2186, 2189; *Com. v. Philanthropic Soc.*, 5 Binn. (Pa.) 486. But a license once granted cannot be revoked except upon due notice and a hearing. The holder is given an opportunity to meet charges and evidence tending to show his unfitness. (The same considerations that forbid the revocation of a license, except upon notice and a hearing, also require that the applicant for a license who possesses the requisite medical qualifications shall not be denied a license without a hearing on the question whether he is in other respects worthy of public confidence.)

It is said that mandamus does not lie to compel admission to a corporate franchise, or to an office, when it is plainly apparent that the applicant, if admitted, will be immediately expelled; that in such a case the writ may be properly withheld; and that the writ is not intended to enable a party, by taking advantage of forms or the want of form, to defeat justice. *High, Ex. Rem.* §§ 287, 301; *Ex parte Paine*, 1 Hill (N. Y.) 665; *Rex v. Griffiths*, 5 B. & Ald. 731; *Rex v. Axbridge, Cowp.* 523; *Rex v. Mayor, etc., of London*, 2 T. R. 177,



182; *Rex v. Bishop of Chester*, 1 T. R. 396, 403; *Van Rensselaer v. Sheriff of Albany*, 1 Cow. (N. Y.) 501; *State v. Society*, 15 La. Ann. 73. What the common law of this state is on that subject it is not now necessary to inquire. This case depends upon the statute, which does not authorize the exclusion of the plaintiff from the rights of a licensed physician without trial.

An examination for the purpose of ascertaining his medical and surgical knowledge and skill is rendered unnecessary by his diploma from a medical school authorized to confer degrees in medicine and surgery, the board of censors being satisfied that he obtained his diploma after pursuing the prescribed course of study and upon due examination. He is exempted by the statute from the examination which would be required if he had no diploma. But the legal meaning of the statute does not require the issue of a license which should be immediately revoked for want of other qualifications than medical and surgical knowledge and skill. A license may be refused, if, on other grounds, upon due notice and hearing, he is fairly proved by the defendants to be unworthy of public confidence. If he desires a hearing before the defendants on that question, further proceedings in this case will await the result of the speedy trial to which he is entitled before the board.

Trial granted. All concurred.<sup>48</sup>

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DODD et al. v. FRANCISCO et al.

Supreme Court of New Jersey, 1902. 68 N. J. Law, 490, 53 Atl. 219.

On certiorari.

DIXON, J. This certiorari brings before the court the proceedings of the state board of health respecting an application for permission to locate a cemetery in the town of Bloomfield, Essex county. The application was first presented on December 24, 1900, to the council of the town, and being approved by that body was then presented to the local board of health, which on March 5, 1901, refused to give its consent. Thereupon the applicants appealed to the state board of health, and on June 28, 1901, that board passed a resolution by which the action of the local authorities was reversed and the desired permission was granted. This resolution was set aside by this court at the term of February, 1902, because the parties interested had not been heard before the board itself; the only hearing given to them having been had before a committee of the board.

Afterwards, on April 22, 1902, the counsel of the respective par-

<sup>48</sup> See *Queen v. Justices of Walsall*, 3 Common-Law R. 100 (1854); *Ex parte Kavanagh*, 10 Times L. Rep. 533 (1894); *In re Schomaker*, 15 Misc. Rep. 648, 38 N. Y. Supp. 167 (1895), hearing a matter of custom and courtesy. Right of remonstrants to be heard. *Steinkraus v. Hurlbert*, 20 Neb. 519, 30 N. W. 940 (1886).

ties were notified that on May 8, 1902, at 2 o'clock p. m., in the state house, the state board of health would meet to consider the application, and at that time and place counsel representing the applicants and the opponents appeared and were fully heard by the board, as were also all individuals who desired to express their views. The result of the board's deliberation was another resolution, passed May 22, 1902, to the same effect as that of June 28, 1901, which resolution is now before us for review.

The statute under which these proceedings were taken is the sixth section of a supplement to the cemetery act, approved March 25, 1885. Gen. St. p. 354. \* \* \*

The third, fifth and sixth reasons assigned for annulling the resolution present two questions—First, whether the board was bound to examine persons under oath touching the matters stated and controverted at the hearing before it; and, second, whether the board had a right to consider a report made to it by its committee while the first appeal was pending.

In the opinion delivered by Mr. Justice Garretson in the case above cited it is said: "The board of health was acting judicially upon the application before it, and all parties were entitled to be heard by the board in a legally organized meeting of the board." This expression is referred to by counsel for the prosecutors as indicating that it was the duty of the board to examine witnesses as to disputed questions of fact. But we do not so understand it. Its import is merely that the functions of the board were such as required the exercise of the judgment of the board itself, and hence that parties interested had a right to present and discuss before the board the matters on which its judgment should rest. Nor do we find either in the statute relating to cemeteries or in that establishing the state board of health (Gen. St. p. 1634), any indication that the board was to proceed as courts do in suits inter partes. There is nothing suggestive of a power to summon witnesses, to administer oaths or to compel the giving of evidence, either oral or written. Moreover, the matters to be considered by the board respecting the propriety of locating a new cemetery are of so general and public a nature that they can be decided more intelligently by observation and discussion than by testimony. In this respect the board resembles boards of assessment, whose proceedings involve the exercise of judicial functions (*Peckham v. Newark*, 43 N. J. Law, 576), but whose judgment is to be founded on facts obvious to their senses or ascertained by inquiry and examination, who, although not authorized to call witnesses and examine them upon oath, should, as do surveyors and freeholders in road cases, visit the premises in controversy and avail themselves of every accessible means of information likely to aid them in reaching a proper determination. *State v. Jersey City*, 24 N. J. Law, 662, 665.

We therefore conclude that the board was not bound to receive evidence under oath.

What has been already said indicates also that in our judgment it was not erroneous for the board to consider the report of its former committee regarding the matter pending before the board. The report was a means of information accessible not only to those who were members of the board when the report was presented, but also to new members. As a part of the discussion proper in the deliberations of such bodies, the report was at least the statement of persons who had made special investigation and presumably formed impartial judgments on the matter under consideration. \* \* \* 49

Resolution granting the desired permission affirmed.

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THE CHICAGO JUNCTION CASE.

Supreme Court of the United States, 1924. 264 U. S. 258, 44 S. Ct. 317, 68 L. Ed. 667 (1924).

See ante, p. 164 for a report of the case.

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SMITH et al. v. FOSTER, Federal Prohibition Administrator, et al.

District Court of the United States, S. D. New York, 1926. 15 F.(2d) 115.

In Equity. Suit by William W. Smith and another, copartners doing business under the firm and style name of W. W. Smith & Co., against John A. Foster, Federal Prohibition Administrator for the state of New York, and as successor of Frank Putney, Federal Prohibition Director and Acting Federal Prohibition Administrator for the state of Connecticut, and another, to review a decision refusing an application for a permit to deal in denatured alcohol. Decision reversed, with directions.

THACHER, District Judge. The application for a permit under sections 4 and 6 of title 2 of the National Prohibition Act (41 Stat. 309 [Comp. St. §§ 10138½b, 10138½c]), was filed with the collector of internal revenue in Hartford, Conn., in July, 1925. The bond required by the regulations was filed at or about the same time, and the application appears to comply with the regulations of the department. Before making application for the permit, the applicants leased for a term of one year from August 1, 1925, premises suitable for the storage of denatured alcohol in Waterbury, Conn. Not having been advised of any action taken by the department, counsel for the applicants on

<sup>49</sup> The rest of the opinion is omitted. See ante, p. 97.

"All bodies composed of a number of persons may, and generally do, act through committees of one or more to procure facts in reference to the matter to be acted upon and receive recommendations as to the action that should be adopted." *Earl & Wilson v. Raymond*, 188 Ill. 15, 17, 59 N. E. 19, 20 (1900).



September 3, 1925, wrote to the Federal Prohibition Director having the matter in charge in part as follows:

"If the application is refused, it is requested that reasons for the refusal be given. If the application has not been acted upon, and if there is any possible consideration on your part to disapprove this application, before the same is done, I request that my clients be given an opportunity to appear before you for a hearing."

At the time this letter was received no action had been taken on the application. The request for a hearing was, however, ignored, and on October 14, 1925, the application for a permit was refused, of which fact the applicants were advised without any statement as to the grounds of the refusal. From the records of the department introduced upon the trial, it appears that the grounds of refusal were that the application was considered excessive in amount, that no evidence was offered as to a market probably available for the quantities of alcohol desired, and that "the personnel of the company is not such as warrants the confidence of the department." \* \* \*

The application was refused because the acts of the general manager of the corporation applying for the permit in connection with his prior service as a prohibition agent were such as "not to warrant the confidence of the department." Notwithstanding the duty imposed upon the Commissioner and his subordinates to fairly find the facts and to base their findings upon the evidence, the request for a hearing was ignored, and upon a finding of lack of confidence based only upon *ex parte* investigation the permit was refused without explanation. The proceeding suggests the well-known jingle: "I do not like thee, Dr. Fell; the reason why I cannot tell." Such procedure seems to find justification in the regulation which provides that the prohibition administration "shall also make a careful investigation into the character of the person or persons applying for the permit, and, if for any reason he shall find that the person or persons are not entitled to the confidence of the Department, he should refuse to approve the application." Such procedure cannot, however, receive the sanction of law.

If the finding of lack of confidence implies dishonesty and lack of integrity, there can be no doubt of the duty to refuse the application. *Ma-King Products Co. v. Blair* (C. C. A.) 3 F.(2d) 936; *Krasnow v. Canfield*, 10 F.(2d) 1019 (C. C. A. 2d Circuit, Feb. 17, 1926). In the latter case, decided without opinion, the point was made that the Commissioner could not refuse an application for a permit because the applicant had violated the terms of a permit which had been revoked more than one year prior to the application. In affirming the judgment below, this point was overruled. From this ruling it follows that the Commissioner may refuse a permit, if satisfied that the applicant, because of past conduct, is not to be trusted to observe the law in the conduct of his business as a permittee. In principle, the decision is in approval of the decision of the Circuit Court of Appeals in the Third Circuit. *Ma-King Products Co. v. Blair*, *supra*.

But in every case, a finding of lack of confidence based upon prior acts of misconduct involves a finding of fact, and the exercise of the Commissioner's discretion based thereon. In this case the only support for a finding of misconduct is found in the report of an investigator, composed mainly of hearsay statements made by persons obviously hostile in their attitude toward the general manager, their hostility having been engendered by the fact that while in the government service he had procured the revocation of permits held by them.

It may be said that, in contrast to sections 5 and 9, section 6 of the National Prohibition Act (title 2), being Comp. St. §§ 10138 $\frac{1}{2}$ bb, 10138 $\frac{1}{2}$ c, 10138 $\frac{1}{2}$ dd, does not in terms provide for a hearing before granting or refusing a permit. But obviously there was a reason for this. The application upon its face may disclose circumstances justifying its denial without a hearing. Facts conceded or not disputed in the correspondence between the Commissioner or his subordinates and the applicant may also justify a summary refusal of a permit. Uncontroverted facts may of course be accepted and acted upon without formal hearing, and where the conceded facts are sufficient to warrant refusal of the permit, certainly the applicant cannot complain if a hearing be not granted. Hence it would have been uselessly burdensome had the statute required a hearing upon every application. From its failure to do so it is to be plainly inferred that Congress intended that such hearings should only be had when required in the proper and lawful exercise of judicial discretion.

If the refusal of a permit were intended by the statute to be regarded as a matter purely administrative in character, no notice or opportunity to be heard would be necessary. *People ex rel. Lodes v. Dept. of Health*, 189 N. Y. 187, 82 N. E. 187, 13 L. R. A. (N. S.) 894. But it is clear from the provisions for review that the Commissioner is to reach a decision which in its nature can be judicially reviewed, and which is to be based upon findings involving conclusions of fact as well as of law. *Gautieri v. Sheldon* (D. C.) 7 F.(2d) 408; *Vollmer Beverage Co. v. Blair* (D. C.) 2 F.(2d) 469. From these provisions it plainly appears that the refusal of a permit is not an act purely administrative in character, and that where questions are seriously controverted an opportunity to be heard should be granted. *Gautieri v. Sheldon*, supra; *Fred Feil Brewing Co. v. Blair* (D. C.) 2 F.(2d) 881. The injustice of proceeding upon hearsay reports and without a hearing in this case was demonstrated upon the trial, not only by testimony in denial of the charges of misconduct, but by the unusual character of the testimony adduced in support thereof. The refusal of the application without a hearing was unlawful, and the Commissioner's decision must therefore be reversed.<sup>50</sup>

<sup>50</sup> See *Bratton v. Chandler*, 260 U. S. 110, 43 S. Ct. 43, 67 L. Ed. 157 (1922).

"It is next objected that no opportunity was given to the petitioner to be heard in reference to the charges upon which the committee acted in denying him admission to practise. We think that the petitioner having shown by his

SECTION 13.—ALIENS *Smith*

## KAORU YAMATAYA v. FISHER (THE JAPANESE IMMIGRANT CASE).

Supreme Court of the United States, 1903. 189 U. S. 86, 23 S. Ct. 611, 47 L. Ed. 721.

Mr. Justice HARLAN. \* \* \* Leaving on one side the question whether an alien can rightfully invoke the due process clause of the Constitution who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population, before his right to remain is disputed, we have to say that the rigid construction of the acts of Congress suggested by the appellant are not justified. Those acts do not necessarily exclude opportunity to the immigrant to be heard, when such opportunity is of right. It was held in *Den ex dem. Murray v. Hoboken Land & Improv. Co.*, 18 How. 272, 280, 281, 283, 15 L. Ed. 372, 376, 377, that "though 'due process of law' generally implies and includes actor, reus judex, regular allegations, opportunity to answer and a trial according to some settled course of judicial proceedings, \* \* \* yet this is not universally true," and "that though, generally, both public and private wrongs are redressed through judicial action, there are more summary extra-judicial remedies for both." Hence, it was decided in that case to be consistent with due process of law for Congress to provide summary means to compel revenue officers—and, in case of default, their sureties—to pay such balances of the public money as might be in their hands. Now, it has been settled that the power to exclude or expel aliens belonged to the political department of the government, and that the order of an executive officer invested with the power to determine finally the facts upon which an alien's right to enter this country, or remain in it, depended, was "due process of law, and no other tribunal, unless expressly authorized to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency."

application that being a citizen of the United States and a certified public accountant under the laws of a state, he was within the class of those entitled to be admitted to practise under the board's rules, he should not have been rejected upon charges of his unfitness without giving him an opportunity by notice for hearing and answer. The rules adopted by the board provide that 'the board may in its discretion deny admission, suspend or disbar any person.' But this must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process. *Garfield v. United States*, 32 App. D. C. 153, 158 (1908); *United States ex rel. Wedderburn v. Bliss*, 12 App. D. C. 485 (1898); *Phillips v. Ballinger*, 37 App. D. C. 46, 51 (1911)." See, also, *Goldsmith v. U. S. Board of Tax Appeals*, 270 U. S. 117, 123, 46 S. Ct. 215, 217 (70 L. Ed. 494) (1926).



*Nishimura Ekiu v. United States*, 142 U. S. 651, 659, 35 L. Ed. 1146, 1149, 12 S. Ct. 336; *Fong Yue Ting v. United States*, 149 U. S. 698, 713, 37 L. Ed. 905, 913, 13 S. Ct. 1016; *Lem Moon Sing v. United States*, 158 U. S. 538, 547, 39 L. Ed. 1082, 1085, 15 S. Ct. 967. But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends,—not necessarily an opportunity upon a regular set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.

This is the reasonable construction of the acts of Congress here in question, and they need not be otherwise interpreted. In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution. An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears. The words here used do not require an interpretation that would invest executive or administrative officers with the absolute, arbitrary power implied in the contention of the appellant. Besides, the record now before us shows that the appellant had notice, although not a formal one, of the investigation instituted for the purpose of ascertaining whether she was illegally in this country. The traverse to the return made by the immigration inspector shows upon its face that she was before that officer pending the investigation of her right to be in the United States, and made answers to questions propounded to her. It is true that she pleads a want of knowledge of our language; that she did not understand the nature and import of the questions propounded to her; that the investigation made was a "pretended" one; and that she did not, at the time, know that the investigation had reference to her being deported from the country. These considerations cannot justify the intervention of the courts. They could have been presented to the officer having primary control of such a case, as well as upon an appeal to the Secretary of the Treasury, who had power to order an-

other investigation if that course was demanded by law or by the ends of justice. It is not to be assumed that either would have refused a second or fuller investigation, if a proper application and showing for one had been made by or for the appellant. Whether further investigation should have been ordered was for the officers charged with the execution of the statutes to determine. Their action in that regard is not subject to judicial review. Suffice it to say, it does not appear that appellant was denied an opportunity to be heard. And as no appeal was taken to the Secretary from the decision of the immigration inspector, that decision was final and conclusive. If the appellant's want of knowledge of the English language put her at some disadvantage in the investigation conducted by that officer, that was her misfortune, and constitutes no reason, under the acts of Congress, or under any rule of law, for the intervention of the court by habeas corpus. We perceive no ground for such intervention—none for the contention that due process of law was denied to appellant.

The judgment is affirmed.

Mr. Justice BREWER and Mr. Justice PECKHAM dissented.

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#### ROUX v. COMMISSIONER OF IMMIGRATION.

Circuit Court of Appeals of the United States, 1913. 203 F. 413.

WOLVERTON, District Judge (after stating the facts as above).<sup>51</sup> Two questions are presented by this record and insisted upon by counsel for petitioner: First, whether petitioner was awarded a full and fair trial before the inspectors, for her first hearing was had before Inspector Watts and her subsequent hearing before Inspector Ainsworth; and, second, whether she was deportable under the act of February 20, 1907, as amended by the act of March 26, 1910, upon the charge preferred against her.

Rule 22 of the Department of Commerce and Labor, clauses (b) and (c) of subdivision 4, provides:

"(b) During the course of the hearing the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued; and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be represented by counsel and shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded,

<sup>51</sup> The statement of facts is omitted. Petitioner was held for deportation as being unlawfully within the United States, in that she had been found employed by, in, or in connection with, a house of prostitution. She was employed as a cook.

and to offer evidence to meet any evidence theretofore or thereafter presented by the government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in an accompanying brief.

"(c) At the close of the hearing the full record shall be forwarded to the Bureau, together with any written statement submitted by counsel and the recommendations of the examining officer and the officer in charge for determination as to whether or not a warrant for deportation shall issue."

Rules of November, 30, 1911.

These provisions indicate the solicitude of the Department of Commerce and Labor that the alien shall have a fair and altogether impartial and unbiased hearing, free from restraint or any undue influence in the manner of his defense to any charges made against him upon which he may be deported. Was the petitioner accorded such a hearing before the inspectors?

It is unquestioned that petitioner was duly apprised of her right to be represented by counsel at the hearing, and to inspect all the evidence adduced against her. She replied that as soon as her friends came she would be able to decide. Later in the day her daughter came, accompanied by Lombard, and they made it their purpose to inquire whether it was necessary that petitioner should procure counsel in her defense. They were told by the inspector that it was not necessary to get a lawyer; that it was no use; that the case was all right; and that they did not need a lawyer; to "never mind about a lawyer; there is hardly anything to it. \* \* \* You just come, you and your wife. You don't need any other witnesses." This latter to Lombard. Moved by this advice, Lombard advised petitioner that it was not necessary for her to have a lawyer, and none was secured. These witnesses were reputable, namely, the daughter and Lombard, and their testimony is in no way contradicted or discredited. Later two witnesses, Esmiol and Pellan, were produced and their testimony heard. Thus petitioner complied with the suggestion of the inspector to bring two witnesses.

Rule 22 but reflects how essential it may be for the accused to have counsel: "He [counsel] shall be permitted to be present during the further conduct of the hearing to inspect and make a copy of the minutes of the hearing."

And: "At the close of the hearing [it is further provided] the full record shall be forwarded to the Bureau, together with any written argument submitted by counsel and the recommendations of the examining officer and the officer in charge for determination as to whether or not a warrant for deportation shall issue."

The honorable Secretary of Commerce and Labor is the adjudicating officer who determines upon the record whether deportation shall follow, and the only representation that the accused can have before that officer is through the argument of counsel. If, therefore, she is de-



prived of counsel in the hearing before the inspector and of the opportunity to be heard before the honorable Secretary of Commerce and Labor, it is manifest that she is not accorded the full and fair trial that the rules of the Department of Commerce and Labor are intended to secure.

Now, we are not impressed that there was any intimidation exerted on the part of the inspector to prevent the petitioner from employing counsel, but we do think that he overpersuaded her, and thereby induced and unduly influenced her not to employ counsel, and that by reason thereof she had none. She was led to believe, or at least such is the natural and indubitable inference to be drawn from the language of the inspector, that the case against her was a weak one; he saying: "There is hardly anything to it."

The effect is the same, whether she was overpersuaded from employing counsel or otherwise induced to forego the privilege; she did not employ any. The inspector should have advised her at all times that she was entitled to counsel, and should have refrained from saying anything that would have a tendency to induce her not to employ one.

We conclude, therefore, that the petitioner was not awarded the full and fair trial that the law and rules of the Department of Commerce and Labor accord her. In support of these views, see *United States v. Williams* (D. C.) 185 F. 598.

This renders it unnecessary to discuss the second point.

It follows that the judgment of the District Court should be reversed and the cause remanded, with directions to discharge the petitioner from custody.

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### CHEW HOY QUONG v. WHITE, Immigration Com'r.

Circuit Court of Appeals of the United States, 1918. 249 F. 869.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Petition by Chew Hoy Quong, on behalf of his wife, Quok Shee, for writ of habeas corpus against Edward White, Commissioner of Immigration at the Port of San Francisco, Cal. From a judgment denying the writ, petitioner appeals. Reversed, and cause remanded, with instructions to issue the writ.

The appellant, a Chinese merchant domiciled in the United States, appeals from an order of the court below denying his petition for a writ of habeas corpus on behalf of Quok Shee, who he alleged to be his wife. The petition alleged that Quok Shee was unlawfully imprisoned and restrained of her liberty by the Commissioner of Immigration; that on May 15, 1915, the petitioner, who had been a Chinese merchant lawfully domiciled in San Francisco for more than 20 years,

departed for China on a temporary visit, and was there married to Quok Shee, and that in company with his wife he returned to San Francisco on September 1, 1916; that a hearing was had before the inspector, who reported favorably on Quok Shee's application for admission to the United States as the wife of the petitioner, but that thereafter the Commissioner ordered a re-examination, the result of which was that Quok Shee's application was denied; and that upon her appeal from that decision, the Secretary of Labor ordered that she be deported. The petition alleged that the hearing was unfair, in that, after the appeal had been taken, the attorneys for Quok Shee were denied the privilege of interviewing her for the purpose of introducing further evidence in support of her appeal; also that in the records of the immigration authorities it appears that their decision was influenced by a confidential communication which they had received in reference to the right of Quok Shee to admission into the United States, which confidential information was forwarded to the Commissioner of Labor, to be considered on the appeal, as is shown from the following extract: "This is one of the three cases in which the department received apparently authentic confidential information going to show that the women involved were being brought to this country for immoral purposes." And the petitioner alleged upon information and belief that the immigration authorities decided his wife's application for admission to the United States adversely by reason of such confidential information, which was not permitted to be of record, and was not known to the petitioner, or Quok Shee, or her attorneys.

GILBERT, Circuit Judge (after stating the facts as above). The denial of the right of the applicant's attorneys to interview her pending the determination of her application by the immigration authorities was, we think, in itself sufficient ground for holding that the hearing was unfair. *Mah Shee v. White*, 242 F. 868, 155 C. C. A. 456. Aside from that, we hold that the fact that the immigration authorities received a confidential communication concerning the applicant's right to admission, upon which they acted, and which was forwarded to the Department of Labor for its consideration, was sufficient to constitute the hearing unfair. However far the hearing on the application of an alien for admission into the United States may depart from what in judicial proceedings is deemed necessary to constitute due process of law, there clearly is no warrant for basing decision, in whole or in part, on confidential communications, the source, motive, or contents of which are not disclosed to the applicant or her counsel, and where no opportunity is afforded them to cross-examine, or to offer testimony in rebuttal thereof, or even to know that such communication has been received.

The judgment is reversed, and the cause is remanded, with instructions to issue the writ.

UNITED STATES ex rel. TISI v. TOD, Commissioner of  
Immigration.

Supreme Court of the United States, 1924. 264 U. S. 131, 44 S. Ct. 260, 68 L. Ed. 590.

Appeal from the District Court of the United States for the Southern District of New York.

Habeas corpus by the United States, on the relation of Catoni Tisi, alias Lista Cortina, against Robert E. Tod, Commissioner of Immigration at the Port of New York. From an order dismissing the writ, relator appeals. Affirmed.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Tisi, an alien, was arrested in deportation proceedings as being within the United States in violation of law. The ground specified was knowingly having in his possession for the purpose of distribution printed matter which advocated the overthrow of the government of the United States by force. Act of October 16, 1918, c. 186, §§ 1 and 2, 40 Stat. 1012 (Comp. St. Ann. Supp. 1919, §§ 4289 $\frac{1}{4}$ b[1], 4289 $\frac{1}{4}$ b[2]), as amended by Act of June 5, 1920, c. 251, 41 Stat. 1008 (Comp. St. Ann. Supp. 1923, § 4289 $\frac{1}{4}$ b[1]). The warrant of deportation issued after a hearing. Then this petition for a writ of habeas corpus was brought in the federal court, and heard upon the return and a traverse thereto. The order, entered without opinion, dismissed the writ, remanded the relator to the custody of the commissioner of immigration at the port of New York, and granted a stay, pending the appeal to this court. The case is here under section 238 of the Judicial Code (Comp. St. § 1215), the claim being that Tisi was denied rights guaranteed by the federal Constitution.

Tisi's claim to be discharged on habeas corpus rests wholly upon the contention that he has been denied due process of law. There was confessedly due notice of the charge and ample opportunity to be heard. What Tisi urges is that there was no evidence to sustain the finding that he knew the seditious character of the printed matter. Such knowledge is not, like alienage, a jurisdictional fact. *Ng Fung Ho v. White*, 259 U. S. 276, 284, 42 S. Ct. 492, 66 L. Ed. 938; *United States ex rel. Bilokumsky v. Tod*, 263 U. S. 149, 44 S. Ct. 54, 68 L. Ed. 221, decided November 12, 1923. But it is an essential of the authority to deport. There is no suggestion that the Secretary of Labor failed to recognize this requirement. The contention is that he erred in deciding that there was substantial evidence of such knowledge and in allowing the supposed evidence to convince him of the fact. The printed matter found consisted of leaflets in the English language. Tisi testified that he cannot read English, that he did not know the character of the leaflets, and that his presence in the company of other Italians who were seen folding the leaflets was accidental. The Secretary of Labor was not obliged to believe this testimony. The govern-



ment did not introduce any direct evidence to the contrary. But there was much evidence of other facts from which Tisi's knowledge of the character of the leaflets might reasonably have been inferred. We do not discuss the evidence, because the correctness of the judgment of the lower court is not to be determined by inquiring whether the conclusion drawn by the Secretary of Labor from the evidence was correct, or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found.

The denial of a fair hearing is not established by proving merely that the decision was wrong. *Chin Yow v. United States*, 208 U. S. 8, 13, 28 S. Ct. 201, 52 L. Ed. 369. This is equally true whether the error consists in deciding wrongly that evidence introduced constituted legal evidence of the fact or in drawing a wrong inference from the evidence. The error of an administrative tribunal may, of course, be so flagrant as to convince a court that the hearing had was not a fair one. Compare *United States ex rel. Bilokumsky v. Tod*, 263 U. S. 149, 44 S. Ct. 54, 68 L. Ed. 221, decided November 12, 1923; *Kwock Jan Fat v. White*, 253 U. S. 454, 40 S. Ct. 566, 64 L. Ed. 1010; *Zakonaite v. Wolf*, 226 U. S. 272, 33 S. Ct. 31, 57 L. Ed. 218; *Tang Tun v. Edsell*, 223 U. S. 673, 32 S. Ct. 359, 56 L. Ed. 606. But here no hasty, arbitrary, or unfair action on the part of any official, or any abuse of discretion, is shown. There is no claim that the lack of legal evidence of knowledge was manifest, or that the finding was made in willful disregard of the evidence to the contrary, or that settled rules of evidence were ignored. The procedure prescribed by the rules of the department appears to have been followed in every respect, and the legality of that prescribed is not questioned. There is no suggestion that Tisi was not allowed to prepare for the hearing, by prior examination of the written evidence on which the warrant of arrest issued, or that he was otherwise restricted in his preparation of the defense. The hearing was conducted orally. Tisi was present and was represented by counsel. He testified fully, and the many witnesses produced by the government were cross-examined by his counsel. He was given ample time in which to present the evidence, the argument, and a brief. Under these circumstances, mere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process of law.

Affirmed.

## DE VERTEUIL, v. KNAGGS.

House of Lords, Privy Council. [1918] A. C. 557.

Appeal from a judgment of the Supreme Court (June 24, 1916), reversing a judgment of Blackwood Wright, J.

The appellant, the owner of an estate in Trinidad, sued the respondents, the acting Governor of Trinidad and the Protector of Immigrants, for a declaration that an order made under s. 203 of the Immigration Ordinance for the transfer of the immigrants indentured on the estate was of no effect, and for an injunction. The facts appear from the judgment of their Lordships.

The trial judge, Blackwood Wright, J., held that the power to make the order could only be exercised after the person against whom the order was to be directed had been fully informed of the case against him and had been properly heard upon it; that the order must be taken to have been made upon January 21, 1916, and that, as upon that date the appellant and his manager had not been fully informed of the case against them, the order was improperly made; he accordingly granted an injunction.

Upon appeal to the full court (Lucie Smith, C. J., and Russell, J.) the decision was reversed. The learned judges agreed with the view that the appellant was entitled to be heard in answer to the complaints but thought that he had had a sufficient opportunity to meet the case against him.

March 21. The judgment of their Lordships was delivered by

LORD PARMOOR. The appellant has been for several years the owner of the La Gloria estate, in the ward of Upper Caroni, in the Island of Trinidad. The respondent, the Honourable Samuel William Knaggs, C. M. G., was at all material dates the acting Governor of the Colony of Trinidad and Tobago, and the respondent the Honourable Arnauld de Boissiere was at all material dates the head of the Immigration Department of the said Colony and the Protector of Immigrants. The question involved in the appeal is whether an order made by the acting Governor for the transfer of the indentures of the immigrants indentured on the said La Gloria estate is a valid and effective order. This question was answered in the negative by Blackwood Wright, J., and in the affirmative by the Supreme Court sitting in appeal. The contention of the appellant is that the order of Blackwood Wright, J., was correct, and that the order of the Supreme Court should be reversed.

The Immigration Ordinance No. 161, as amended by subsequent Ordinances, contains the provisions applicable to the introduction and employment of immigrants in the Colony of Trinidad and Tobago. Section 203 provides: "If at any time it appears to the Governor, on sufficient ground shown to his satisfaction, that all or any of the immigrants indentured on any plantation should be removed therefrom,

it shall be lawful for him to transfer the indentures of such immigrants for the remainder of their respective terms of service to any other employer who may be willing to accept their services and pay the remaining indenture fees. \* \* \*

It was under this section of the Ordinance that the Governor made the order to which the appellant takes objection. There is no doubt that if the acting Governor did act in good faith within the limits of the authority conferred by the Ordinance he is fully protected, and no Court has any power to interfere. The case of the appellant, as stated, in the indorsement of his writ of summons, is that the order was not made under the proper and statutory exercise of the discretion vested in the acting Governor by section 203 of the Ordinance, and is consequently null and of no effect. It is clearly within the power and jurisdiction of the municipal courts to entertain this question, and to determine whether the acting Governor, in making the order, which the appellant impugns, acted within the limits of the powers conferred on him by a municipal ordinance.

Section 203 of the Ordinance empowers the Governor to transfer the indentures of the immigrants "on sufficient ground shown to his satisfaction, that all or any of the immigrants indentured on any plantation should be removed therefrom." The same section empowers the Protector of Immigrants to make a temporary transfer "pending the decision of the Governor," but it is under the earlier portion of the section that the present case has arisen. The Ordinance does not prescribe any special form of procedure, but there is an obvious implication that some form of inquiry must be made, such as will enable the Governor fairly to determine whether a sufficient ground has been shown to his satisfaction for the removal of indentured immigrants. The particular form of inquiry must depend on the conditions under which the discretion is exercised in any particular case, and no general rule applicable to all conditions can be formulated. In the particular case under appeal the acting Governor exercised his discretion on a complaint made against the appellant by the Protector of Immigrants with regard to the treatment and condition of indentured immigrants on his La Gloria estate. What is the procedure which in such a case the law will imply when the Legislature is silent? The acting Governor was not called upon to give a decision on an appeal between parties, and it is not suggested that he holds the position of a judge or that the appellant is entitled to insist on the forms used in ordinary judicial procedure. It would not be possible to follow such procedure, since the acting Governor has no power to examine witnesses or to administer an oath. There is, moreover, no allegation that the acting Governor did not act throughout in perfect good faith.

On the other hand, the acting Governor could not properly carry through the duty entrusted to him without making some inquiry whether sufficient grounds had been shown to his satisfaction that immigrants indentured on the La Gloria estate of the appellant should be removed.



Their Lordships are of opinion that in making such an inquiry there is, apart from special circumstances, a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice. It must, however, be borne in mind that there may be special circumstances which would justify a Governor, acting in good faith, to take action even if he did not give an opportunity to the person affected to make any relevant statement, or to correct or controvert any relevant statement brought forward to his prejudice. For instance, a decision may have to be given on an emergency, when promptitude is of great importance; or there might be obstructive conduct on the part of the person affected. Their Lordships, however, do not find any suggestion of such conditions in the case under appeal. Moreover, in this case the Supreme Court, on the evidence before them, has found that the acting Governor did give the appellant a fair opportunity of being heard and of meeting statements made to his prejudice, and, for reasons given later, their Lordships fully concur in this finding.

In *Board of Education v. Rice*, [1911] A. C. 179, 182, the question raised was whether the Board of Education had properly exercised their statutory duty to decide on appeal a question between parties. The statement of principle made in that case by the Lord Chancellor (Earl Loreburn) is, however, in the opinion of their Lordships, applicable to the conditions under which the decision in this case was given by the acting Governor: "In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. \* \* \* They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view." Cf. *Spackman v. Plumstead District Board of Works* (1885) 10 App. Cas. 229, and *Local Government Board v. Arlidge*, [1915] A. C. 120.

The only remaining question to consider is whether the acting Governor did comply with the requirements of a fair inquiry.

On December 16, 1915, the acting Governor *ex parte*, and affording no opportunity to the appellant to make any answer or explanation, made an order for the removal of the indentured immigrants from the La Gloria estate and for the transfer of their indentures to some other employer. The first intimation which the appellant received was in a letter of December 20, 1915, from the Protector of Immigrants to the appellant's manager. This letter sets out under four heads the complaints made by the Protector of Immigrants with regard to the indentured immigrants on the La Gloria estate. The complaints are:

(1) That they were not receiving proper medical attention. (2) That they were dissatisfied because of their isolated condition. (3) That the number of convictions was high. (4) That the wages earned were comparatively small.

After the receipt of this letter the appellant and his manager sought and obtained a personal interview with the acting Governor on December 23, 1915. There is some discrepancy as to the statements made at this interview, but the material factor is that the appellant and his manager were granted a fair opportunity of placing before the acting Governor their answer to the allegations made in the letter of the Protector of Immigrants. At this interview a question was raised as to the accuracy of certain figures, and subsequently on December 27, 1915, the appellant's manager wrote to the Colonial Secretary enclosing a copy of the register of cases before the magistrates for the La Gloria estate from October 1, 1914, to December 30, 1915, and giving particulars tending to show that the authorities had arrived at their figures on a wrong basis and that further inquiry was necessary. On January 7, 1916, the Colonial Secretary wrote to the appellant's manager stating that the letter of December 27 had received careful consideration, but "in view of the report of the Protector of Immigrants, his Excellency regrets that he does not feel justified in cancelling the order made for the removal of the indentured immigrants from the estate in question." After further correspondence the Colonial Secretary on January 21, 1916, wrote to the appellant's manager, and stated that, on the figures submitted, "his Excellency saw no cause to cancel the order made." There appears to have been a further investigation of the figures, and finally on March 15, 1916, the Protector of Immigrants wrote to the appellant's manager that the acting Governor "has decided that the immigrants on the La Gloria estate must be removed therefrom and transferred to another estate, the manager of which is willing to accept them." It appears to their Lordships that the correspondence, to which reference has been made, shows that the acting Governor did not proceed without giving fair notice to the appellant of the charges made against him, or without giving him a fair opportunity to make an answer to such charges. It is no part of the duty of a Court to review the discretion exercised by the acting Governor, and the evidence directed to this issue is, in the opinion of their Lordships, irrelevant. It was argued on behalf of the appellant that the validity of the order should be tested either as on December 16, 1915, or at the latest as on January 21, 1916, but there is no reason why the acting Governor may not at any time review or alter a decision previously given, and it may be his duty to do so, in the prudent exercise of his discretion, on a further consideration of all the relevant factors after full inquiry.

For these reasons the appeal fails, and their Lordships will humbly advise His Majesty to dismiss the same with costs.

## SECTION 14.—REMOVAL FROM OFFICE

## DULLAM v. WILLSON.

Supreme Court of Michigan, 1884. 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128.

Quo warranto.

CHAMPLIN, J. \* \* \* That issue is whether, under the Constitution and laws of Michigan, the Governor has power to remove a state officer by such action as was taken in this case, viz.: An act of removal evidenced by writing, under the hand and seal of the executive, filed in the executive office, with notice thereof to the officer removed, communicating to him the alleged grounds of removal, but without giving him notice of charges, complaint or claim of official misconduct or neglect of duty, or opportunity of hearing, or defense. \* \* \*

The Constitution (article 12, § 8) provides that "the Governor shall have power and it shall be his duty, except at such time as the Legislature may be in session, to examine into the condition and administration of any public office, and the acts of any public officer, elective or appointed, to remove from office for gross neglect of duty, or for corrupt conduct in office, or any other misfeasance or malfeasance therein, either of the following state officers, to wit: The Attorney General, \* \* \* or any other officer of the state, except legislative and judicial, elective or appointed, and to appoint a successor for the remainder of their respective unexpired term of office, and report the causes of such removal to the Legislature at its next session." This provision was not contained in the Constitution of 1835. It was added to the present Constitution, by amendment, by the Legislature of 1862 (Laws 1861, p. 588), ratified by the people in 1862. \* \* \*

It will be observed that the section of the Constitution under consideration only authorizes the Governor to remove for specified causes. He is not authorized to exercise the power at his pleasure or caprice. It is only when the causes named exist that the power conferred can be exercised. It follows as a necessary consequence that the fact must be determined before the removal can be made. It is also clear that the fact must be determined by some tribunal invested with judicial power, for a determination whether specified causes exist is the exercise of judicial functions. Judicial determination of facts must rest upon and be preceded by notice, proof and hearing. And the first question is, what is the proper tribunal in which such facts are to be ascertained? In my opinion this provision of the Constitution requires no legislation to make it effective. Read in the light of the history of the times, and the surrounding circumstances when it was



adopted, the grant of power is to the Governor coupled with the duty enjoined to examine into the condition and administration of any public office, and to examine into the acts of any public officer, and to remove from office for gross neglect of duty, or for corrupt conduct in office, any of the officers specified. The amendment for this purpose clothes him with judicial power. It is implied in the grant, and without it the grant would be nugatory and ineffectual to accomplish the purposes for which it was given. \* \* \*

The counsel for the respondent, while granting this, insist that such removal cannot be made without charges, notice and an opportunity for defense, and this I consider the important question in the case.

Unless it is the manifest intention of the section under consideration that the proceedings should be *ex parte* as well as summary, a removal without charges, notice and an opportunity for defense cannot be upheld. The exercise of such power, in such manner, would be too despotic for any attempt at vindication in a country which boasts of the utmost liberty compatible with the safety of the state, and is entirely opposed to the genius of our free institutions. I do not think the people, when they adopted this amendment, intended or supposed that they were placing such unlimited power in the hands of any man. \* \* \*

In *Ramshay's Case*, 18 Ad. & El. (N. S.) 190, it was said: "The Chancellor has authority to remove a judge of a county court only on the implied condition prescribed by the principles of eternal justice, that he hears the party accused. He cannot legally act upon such an occasion without some evidence being adduced to support the charges, and he has no authority to remove for matters unconnected with inability or misbehavior; and where evidence has been given in support of them we think we cannot inquire into the amount of evidence or the balance of evidence, the Chancellor acting within his jurisdiction, being the constituted judge upon this subject." In *Williams v. Bagot*, 3 B. & C. 786, Mr. Justice Bayley said: "It is contrary to common justice that a party should be concluded unheard." The case of *The Queen v. The Archbishop of Canterbury*, 1 El. & El. 545, arose under a statute which enacted that a curate, whose license shall have been revoked by the bishop, might "appeal to the archbishop of the province, who should confirm or annul such revocation as to him shall appear just and proper." An appeal was taken to the archbishop, who, without giving the appellant an opportunity to be heard, confirmed the revocation. Lord Campbell said: "No doubt the archbishop acted most conscientiously, and with a sincere desire to promote the interests of the church; but we all think that he has taken an erroneous view of the law. He was bound to hear the appellant, and he has not heard him. It is one of the first principles of justice, that no man should be condemned without being heard." Mr. Justice Wightman said "that, *ex debito justitiæ*, every one has a right to be heard before he is condemned."

An act of Parliament gave authority to the bishop to decide, upon affidavit or upon his own knowledge, whether or not the duties of the parish had been inadequately performed, in consequence of the negligence of the incumbent, and whenever it should so appear to his satisfaction he could, by certain proceedings, appoint a curate in place of the incumbent. The bishop, proceeding upon his own knowledge, without notice or an opportunity afforded to the incumbent, adjudged that the duties of the vicarage of the parish were inadequately performed by reason of the vicar's negligence, and proceeded to appoint another person to the place. The incumbent refused to surrender to the new appointee. Lord Lyndhurst held that the language of the act imported inquiry, and a judgment as the result of that inquiry. He said: "He is to form his judgment. It is to appear to him from affidavits laid before him; but, is it possible to be said that it is to appear to him and that he is to form his judgment from affidavits laid before him on the one side, without hearing the other party against whom the charge of negligence is preferred, which is to affect him in his character and in his property? That he is to come to that conclusion, without giving the other party an opportunity of meeting the affidavits by contrary affidavits, and without being heard in his own defense—without having an opportunity even of being summoned for that purpose—as in the present instance; there being no summons, for the motion was proceeded in immediately, without any intimation whatever from the bishop of his intention to proceed, to the party against whom that requisition proceeds." And he further held that when the bishop proceeded, "on his own knowledge, the same course of proceeding is necessary, because a party has a right to be heard for the purpose of explaining his conduct; he has a right to call witnesses, for the purpose of removing the impression made on the mind of the bishop; he has a right to be heard in his own defense." *Capel v. Child*, 2 Cr. & J. 558.

[The opinion then cites and discusses the following cases: Page v. Hardin, 8 B. Mon. (Ky.) 672; Willard's Appeal, 4 R. I. 601; Com. v. Slifer, 25 Pa. 23, 64 Am. Dec. 680; Meade v. Deputy Marshal, 1 Brock. 324, Fed. Cas. No. 9,372; Chase v. Hathaway, 14 Mass. 222.]

The line of authority is not by any means exhausted, but enough cases have been cited to show that the action of the Governor in this case cannot be upheld as a legal and proper exercise of the power conferred upon him. There must be charges specifying the particulars in which the officer is subject to removal. It is not sufficient to follow the language of the Constitution. The officer is entitled to know the particular acts of neglect of duty, or corrupt conduct, or other act relied upon as constituting malfeasance or misfeasance in office, and he is entitled to a reasonable notice of the time and place when and where an opportunity will be given him for a hearing, and he has a right to produce proof upon such hearing. What length of time notice should be given we do not determine; it must depend, in a great measure, upon the circumstances of each case.

I have carefully examined the authorities cited upon the brief of the learned counsel for relator in support of the position that no notice is required to be given, and that the action of the executive is final and conclusive. It is sufficient to say, without commenting specially upon them, that the reasoning of those cases does not commend itself to my judgment. They appear to me to be opposed, not only to the decided weight of authority, but also to the fundamental principles of justice. In what I have said upon the law of this case I have not cast the least imputation upon the motives of the executive. The same presumptions of good faith and honest desire to act within legal and constitutional limits are accorded to him as to either of the other co-ordinate branches of the government, and his motives are not the subject of criticism. I have no doubt that he acted under the impression that he was entirely within the line of his duty as well as of law, and that he believed that the removal of respondent was demanded by the best interests of the public service.

Be that as it may, the relator has not made out a case for the intervention of the court, and judgment must be entered for respondent.<sup>52</sup>

### WILCOX v. PEOPLE.

Supreme Court of Illinois, 1878. 90 Ill. 186.

SHELDON, J. \* \* \* It being found that the power of removal existed in the Governor, the inquiry remains whether it was validly exercised. Relators say not—that the power granted was judicial in its nature, and should have been exercised according to judicial methods; that is, there should have been a specific charge, notice of it, opportunity for defense and hearing, and proof to support the charge. Undoubtedly, the Governor can only remove for some one of the causes specified; but the removal here was for one of these causes—incompetency. The Governor ascertained the existence of the cause here, and made the removal on account of it. The Constitution is silent as to who shall ascertain the cause of removal or the mode of its ascertainment. It simply gives to the Governor the power to remove any officer whom he may appoint, in case of incompetency, etc. It follows, then, that it is with the Governor, who is to act in the matter, to determine, himself, whether the cause of removal exists, from the best lights he can get; and, no mode of inquiry being prescribed for him to pursue, it rests with him to adopt that method of inquiry and ascertainment as to the charge involved which his judg-

<sup>52</sup> Accord: Com. ex rel. Bowman v. Slifer, 25 Pa. 23 (1855); Ham v. Board of Police of Boston, 142 Mass. 90, 7 N. E. 540 (1886); State v. Hawkins, 44 Ohio St. 98, 5 N. E. 228 (1886); State ex rel. Denison v. St. Louis, 90 Mo. 19, 1 S. W. 757 (1886); State ex rel. Attorney General v. Smith, 35 Neb. 13, 52 N. W. 700, 16 L. R. A. 791 (1892); Shurtleff v. United States, 189 U. S. 311, 23 S. Ct. 535, 47 L. Ed. 828 (1903).



ment may suggest as the proper one, acting under his official responsibility, and it is not for the courts to dictate to him in what manner he shall proceed in the performance of his duty, his action not being subject to their revision. The Constitution of this state not only declares that the powers of the government of the state shall be divided into three distinct departments, but has expressly prohibited the exercise of any of the powers properly belonging to one by either of the others.

In the case of *People v. Bissell*, 19 Ill. 229, 232, 233, 68 Am. Dec. 591, where this court discussed very fully the theory of distribution of powers, and the extent of limitations upon each department, it was said: "The Governor is and must be as independent of us as is the Legislature, or as we are of either of them." "When acting within the limits assigned to each, neither can control nor dictate to the others."

The case of *People v. Higgins*, 15 Ill. 110, is a parallel one with the present, except that the power of removal was exercised there by trustees of an institution instead of the executive, and it covers in principle the precise question here raised, and must, we think, be considered as decisive of it against the relators. The case is a very fully considered one, and contains so full an exposition of the principles applicable to this subject that further enlargement upon them is superfluous. The case involved the title to office of the medical superintendent of the Illinois Hospital for the Insane, an institution founded by the state. The medical superintendent was an officer constituted by the act creating the trustees who, as a body corporate, governed the institution. His tenure of office was for ten years. Under the law, power was given to the trustees to remove the superintendent for infidelity to the trust reposed in him, or incompetency to the discharge thereof. The trustees removed Higgins, the superintendent, by resolution, for the reason alleged that he did not "possess the kind of qualifications which are necessary to the discharge of the duties of said office." It was there insisted, as here, that specific and formal charges should have been preferred against the superintendent, that he should have had a formal notice of the time and place of the trial of the charges, and that a regular trial should have been had upon the testimony of witnesses. To which the court answered: "The statute has made none of these formalities necessary, nor does the common law so interpose and attach itself to the statute as to require them." It was said that the trustees, in determining as to the existence of the cause of removal, might act upon their own observation, and exercising their own best judgment, as well as upon facts detailed by others or upon the opinions of witnesses. The case answers the objection made here, that the executive order of removal is void upon its face, as not stating any lawful ground of removal. In stating the cause of removal, the order has adopted the very language employed in the Higgins Case, which the court held there as describing "incompetency," as being language equivalent thereto—a delicate and

inoffensive form of stating that cause of removal. The order, then, does state that cause of removal, the language used to describe it having the warrant of judicial sanction.

In other cases this court has decided that where the law has vested a quasi judicial power, even in subordinate administrative officers, the court will only inquire whether the officer has acted within the power, and will not attempt to substitute its own judgment or discretion for that of the officer, and will not supply any other conditions to the exercise of their discretionary power than such as the law has provided. *Spencer & Gardner v. People*, 68 Ill. 510; *Elliott v. City of Chicago*, 48 Ill. 293; *Porter v. Rockford, Rock Island & St. Louis R. Co.*, 76 Ill. 561. The doctrine of these cases applies with added force to a case of executive action.\* \* \*<sup>53</sup>

### PEOPLE ex rel. GERE v. WHITLOCK.

Court of Appeals of New York, 1883. 92 N. Y. 191.

Appeal from judgment of the General Term of the Supreme Court, in the Fourth Judicial Department, entered upon an order made October 20, 1882, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

This action was in the nature of a quo warranto to try the title of defendants to the office of police commissioners of the city of Syracuse.

On the 29th day of August, 1881, the mayor of Syracuse addressed to each of the relators a written notice that he had removed him from the office of police commissioner, of which he was then an incumbent, by virtue of the act (chapter 559, Laws of 1881), and on the same evening he submitted to the common council a statement of his reasons for such removal, together with a message appointing the defendants to fill the vacancies thereby created. No notice of the mayor's intention had been given to the relators, or to either of them, no charges were presented, and no hearing, or opportunity of hearing, or explanation was afforded to them.

The defendants immediately afterward qualified as such police commissioners, and took possession of the books and papers of the board, and have ever since exercised the duties of the office to the exclusion of the relators.

The statute authorized the mayor to remove from office any commissioner "for any cause deemed sufficient to himself."

DANFORTH, J. \* \* \* The next position of the relators raises a more interesting general question: Whether they were entitled to

<sup>53</sup> Accord: *State ex rel. Attorney General v. Doherty*, 25 La. Ann. 119, 13 Am. Rep. 131 (1873); *Keenan v. Perry*, 24 Tex. 253 (1859). See, also, *State v. McGarry*, 21 Wis. 496 (1868).

have notice or be heard before the final action of the mayor. At common law there could be no doubt as to this. *Bagg's Case*, 11 Coke, 99, Rex. v. Gaskin, 8 Term Rep. 209, and many others cited by the learned counsel for the appellant, stand upon the principle that no one shall be condemned unheard; but this, too, when applied to the term of office, is within the control of the Legislature, and as it gave the power to appoint, may also give the power to remove. Const. art. 10, § 3; *People ex rel. Sims v. Board of Fire Commissioners of the City of New York*, 73 N. Y. 437. In the act before us (Laws 1881, c. 559, § 1) the power of removal has been expressly conferred upon the mayor, to be exercised as to him shall seem meet. In *People ex rel. Mayor v. Nichols*, 79 N. Y. 582, cited by the appellant, the statute requires, not only that cause for removal should exist, but also that the officer should have an opportunity to be heard. The statute before us lacks both conditions. No opportunity to be heard is given, and it is enough if the mayor thinks there is sufficient cause. It may or may not exist, except in his imagination; but his conclusion is final.

The diligence of appellants' counsel has found no case like it, and those cited by him do not apply. They require either the actual existence of "cause," or "sufficient cause" for removal, and so by implication impose investigation before action, or by express language give a hearing to the accused member or official. Here the removal is to be determined summarily, and is intrusted to the unrestrained discretion of the mayor. Nor is this without a precedent. Among other cases, like power is given to the Governor over the superintendent of public works, and to the latter over his assistant superintendents (Const. N. Y. art. 5, § 3), and to the board of commissioners of the fire department of New York over certain subordinates (Laws 1873, c. 335, § 28). Under that statute it was held that the power of removal was to be exercised at pleasure, except in cases where there was an express limitation to a removal after notice and a hearing, and for cause. *People ex rel. Sims v. Board of Fire Com'rs*, supra.

We are, therefore, of opinion that no reason for a reversal of the judgment appealed from is shown, and it should be affirmed.<sup>54</sup>

<sup>54</sup> See *Trainer v. Board of Auditors*, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95 (1891): Supervisors given power to remove officer when in their opinion he is incompetent to execute properly the duties of his office, or when, on charges and evidence, they shall be satisfied that he has been guilty of official misconduct or habitual or willful neglect of duty, construed to permit removal for incompetence without charges, notice, or hearing.



## 67 PEOPLE ex rel. FONDA v. MORTON et al.

Court of Appeals of New York, 1896. 148 N. Y. 156, 42 N. E. 538.

Appeal from Supreme Court, General Term, Third Department.

Proceedings on the relation of Fred P. Fonda against Levi P. Morton and others for a writ of mandamus. From an order of the General Term, without opinion, affirming an order of the Special Term denying the writ, relator appeals. Affirmed.

ANDREWS, C. J. The relator, an honorably discharged Union soldier, was appointed on the 29th of January, 1888, an orderly in the capitol at Albany, at a salary of \$60 a month, and continued to act as orderly until the 28th of February, 1895, when he was discharged by the superintendent of public buildings, with the approval of the trustees, consisting of the Governor of the state, the Lieutenant Governor, and the Speaker of the Assembly. His duties were to wash and clean floors, and to act as policeman and guide in the capitol. After his discharge he applied for a peremptory writ of mandamus directing his reinstatement in his position, claiming that his discharge was unlawful. It appeared from the return to his application that he was discharged for cause, or, as stated therein, for "incompetency and conduct inconsistent with said position." The relator, without denying the fact so alleged in the return, insisted, notwithstanding, that he was entitled to the peremptory writ, and the fact so returned must be taken as true in this proceeding. The discharge of the relator was not preceded by formal charges, or by notice to the relator, or an opportunity to be heard as to the cause of his dismissal. This presents the only question in the case—whether the relator was entitled to a notice and hearing before he could be removed.

By section 4, subd. 3, of the public building law (chapter 227 of the Laws of 1893), which was a substantial re-enactment of chapter 349 of the Laws of 1883, the superintendent of public buildings is authorized, "subject to approval of the trustees, to appoint all persons necessary in the maintenance department of the public buildings and grounds under his charge, and suspend and remove any of them, and prepare rules and regulations for their government." In the appropriation bills passed by the Legislature in each successive year, commencing with 1886, there was inserted in the clause making an appropriation for the care of the public buildings, the salary of the superintendent, and the services of orderlies and watchmen, and other expenses, a proviso that the orderlies and watchmen who should receive any portion of the money so appropriated "shall be persons who are citizens of the state of New York, and who served in the Union army or navy during the late war, and have been honorably discharged therefrom; and such honorably discharged persons shall not be subject to civil service rules of examination." Laws 1886, p. 650. If there was no other legislation affecting the present question, the right to discharge orderlies employed in the capitol, summarily,

would admit of no question. The power to remove employes is given, in express terms, by the public building act, to the superintendent, with the approval of the trustees, without qualification; and, even in the absence of such specific power, the rule is well settled that the power to appoint to the public service carries with it, to the appointing power, in the absence of limiting words or of a fixed term, the right to remove the appointee at pleasure. *People v. Robb*, 126 N. Y. 180, 27 N. E. 267, and cases cited.

But the relator relies upon chapter 716 of the Laws of 1894, which was an act amending chapter 312 of the Laws of 1884, entitled "An act respecting the employment of honorably discharged Union soldiers and sailors in the public service of the state of New York," as containing a limitation upon the power of removal of Union soldiers and sailors employed in the public service, applicable to the position of the relator. The original act of 1884 related to preferences in public employment only, and declared that honorably discharged Union soldiers and sailors, not incapacitated, and possessing the requisite qualifications, should be preferred for appointment and employment in the public departments and upon all public works of the state. This act was amended by chapter 464 of the Laws of 1887 by extending it so as to subject cities, towns, and villages to the same rule, and a section was added enjoining upon all officials and persons possessing the power of appointment a faithful compliance with the act. The obligation to give preference was, after the passage of the original act and the amendment of 1887, and cognate acts, sought to be enforced in the courts by Union soldiers, applicants for appointment to public office; among others, by an applicant for the office of superintendent of public works of a village (*People v. Village of Saratoga Springs*, 54 Hun, 16, 7 N. Y. Supp. 125); for employment as court crier (*People v. Wendell*, 57 Hun, 362, 10 N. Y. Supp. 587); for the office of village attorney (*People v. Village of Little Falls* [Sup.] 8 N. Y. Supp. 512; *Id.*, 54 Hun, 638, 8 N. Y. Supp. 960); collector of taxes (*People v. Barden*, 55 Hun, 612, 8 N. Y. Supp. 960); health inspector (*People v. Summers*, 56 Hun, 644, 9 N. Y. Supp. 700); and in other cases. These attempts generally failed. The relator in such an application could not show that he was entitled in preference to other Union soldiers, and the decision of the appointing power as to fitness, actual or relative, must generally, from the nature of the case, be final. This court in *People v. Lathrop*, 142 N. Y. 113, 36 N. E. 805, had occasion to consider whether the act of 1884, giving preferences in public employments to Union soldiers and sailors, limited the power of removal of a Union soldier, who held a public employment; and the court held that it affixed no restriction on this power, and in no way affected the power of removal, as it existed independently of the act.

The amendment of 1894 for the first time introduced into the act a restriction on the power of removal of Union soldiers and sailors employed in the public service. The first section of the act of 1884 was amended so as to read as follows: "Section 1. In every public

department and upon all the public works of the state of New York, and of the cities, towns and villages thereof, and also in non-competitive examinations under the civil service rules, laws or regulations of the same, wherever they apply, honorably discharged Union soldiers and sailors shall be preferred for appointment and employment; age, loss of limb or other physical impairment which does not in fact incapacitate, shall not be deemed to disqualify them, provided they possess the business capacity necessary to discharge the duties of the position involved. And in all cases the person having the power of employment or appointment, unless the statute provides for a definite term, shall have the power of removal only for incompetency and conduct inconsistent with the position held by the employé or appointee; and in case of such removal or such refusal to allow the preference provided for in this act of and for any such honorably discharged Union soldier, or sailor, or marine, for partisan, political, personal or other cause except incompetency and conduct inconsistent with the position so held, such soldier, sailor or marine so wrongfully removed or refused such preference, shall have a right of action in any court of competent jurisdiction for damages as for act wrongfully done, in addition to the existing right of mandamus; the burden of proving such incompetency and inconsistent conduct as a question of fact, shall be upon the defendant. But the provisions of this act shall not be construed to apply to the position of private secretary or deputy of any official or department, or to any other person holding a strictly confidential position."

It is apparent that the legislation culminating in the act of 1894 has nothing primarily to do with what is called the "civil service system." It was intended to create a privileged class, entitled to preferential employment in subordinate positions in the public service, the foundation of the preference being meritorious service as soldiers and sailors in the war for the preservation of the Union. The original act, which provided for a preference only in the original appointment or employment, but gave no security of tenure, was supplemented in this respect by the amendment of 1894. The legislation as it now stands not only gives a preference in public appointments and employments to Union soldiers and sailors, but makes the appointees irremovable, except upon the particular grounds specified. The removal clause was intended to prevent interference with their tenure for political or partisan or personal reasons. But the statute recognized the principle that incompetent persons, or those whose conduct was inconsistent with the discharge of their duties, should not be retained in the public service, however meritorious their prior service may have been. The statute operates as a limitation upon the power of removal, which must be observed by the officers or body having the appointing power, and it enacts special remedies for its violation.

In the present case the removal was made for the cause specified in the statute, and nothing appears upon the record tending to show



that the power was not exercised in good faith, and in the public interest. The claim that the relator was entitled to prior notice and hearing is not supported by any language in the act. If he was so entitled, it results from some general rule of law implied from the fact that the power of removal was not unrestricted, but could only be exercised for the causes specified. It is important to notice the scope of such an implication, if it exists under the statute in question. The act applies to employés of every grade in the public service or on the public works of the state, and the cities, towns, and villages thereof. The preference is given, not only in clerical or other subordinate positions, but to every person seeking public employment as a laborer on the canals, or on the streets of a city, or in any capacity, however humble. (If employment once secured can only be terminated after a notice and hearing, and something akin to a formal adjudication upon evidence, the system would become almost intolerable. Many things difficult to define in words, which show incompetency in an employé, or disregard of his duty, and which would justify dismissal in the mind of a reasonable employer, would often elude a formal investigation. There are many statutes on the statute book relating to the employment and removal of police officers, clerks, and employés in municipalities, which expressly or by implication require that the power of removal shall only be for cause, after notice and hearing of the person whose removal is contemplated. The practice of legislation in this state has been to insert a provision for notice and hearing when this has been intended. City of New York, Consolidation Act (Laws 1873, c. 335) § 25; *Id.* (Laws 1882, c. 410) §§ 250, 272, 314; City of Brooklyn, Laws 1888, c. 583, tit. 22, § 29; City of Buffalo, Laws 1870, c. 519, tit. 13, § 3.

The acts cognate to the act of 1894, viz. chapter 119 of the Laws of 1888 and chapter 577 of the Laws of 1892, restricting the power of removal of Union soldiers or sailors holding official employment in cities and counties, contain a provision that removals shall not be made "except for cause shown after a hearing had." In view of the course of legislation, and the scope of the act of 1894, we are of opinion that the Legislature intentionally omitted to insert a similar provision in the statute in question.

We concur in the conclusion of the General Term that the Legislature, having prescribed the grounds of removal in the act of 1894, left it to the removing power to determine whether the facts existed which authorized a removal, subject to responsibility for any willful or perverse action, and that no notice is required to be given to the person whose removal is contemplated, before the power can be exercised.

The order should be affirmed. All concur. Order affirmed.

## 62 PEOPLE ex rel. SHUSTER v. HUMPHREY et al.

Court of Appeals of New York, 1898. 156 N. Y. 231, 50 N. E. 860.

Appeal from Supreme Court, Appellate Division, Second Department.

Application by the people, on the relation of Adam Shuster, for a writ of certiorari against William A. Humphrey and others, Commissioners of Police of the City of Poughkeepsie. From an order of the Appellate Division, made by a divided court (22 App. Div. 632, 48 N. Y. Supp. 1112), affirming a dismissal of relator from the police force of the city of Poughkeepsie, he appeals. Reversed.

VANN, J. On the 15th of April, 1895, the relator was appointed a patrolman of the city of Poughkeepsie, after passing the civil service examination as provided by law. He was a veteran of the Civil War, and had never served in the Confederate army or navy. After serving two years in the Union army and receiving an honorable discharge, he enlisted in the navy, and served until the close of the war, when he was honorably discharged from that branch of the service also. On the 5th of May, 1897, he was charged by the mayor of the city "with having made an illegal arrest, in that, without a warrant and without probable cause, he, on or about April 23d, 1897, illegally arrested and detained and brought to the station house one Lewis Richardson, and declined to make a charge against him, whereupon said Richardson was discharged by the sergeant in charge." On the 7th of May following, he was tried upon this charge, and evidence was given tending to show that he made an arrest, without a warrant, for a misdemeanor not committed in his presence, upon the complaint of a man who claimed that the person arrested had assaulted him, and that he was drunk and disorderly. At the instant that this complaint was made, the alleged wrongdoer was running away, and the relator placed him under arrest, and took him to police headquarters, with the understanding that the complainant was to follow immediately, and make a formal complaint. Upon arriving at the police station, the relator declined to make any charge himself against the prisoner, who, as the complainant did not appear, was discharged, after a detention not exceeding five minutes in duration.

As the relator was an honorably discharged soldier, and had never served in the Confederate army or navy, the commissioners had no power to remove him "except for cause shown after a hearing had." Laws 1892, c. 577. The charter of the city of Poughkeepsie, which is a public act, provides that the board of police commissioners of that city have power "to punish any member of the police force on conviction of any legal offense, or neglect of duty, or violation of rules, or absence without leave, or any conduct injurious to the public peace or welfare, or immoral conduct, or conduct unbecoming an officer, or other breach of discipline, by reprimand, forfeiting or withholding

pay for a special time, or dismissal from the force, but no more than thirty days' pay shall be forfeited for any offense." Laws 1896, c. 425, §§ 141, 193.

The relator was entitled to a trial upon charges preferred, and the commissioners had no right to remove him until after they had duly convicted him on one or more of such charges. This is necessarily implied from the words "hearing," "cause shown," "conviction," etc., as used in said statutes. After a lawful conviction upon a definite charge made under the statute, they had the right to remove him for that "cause shown," but they had no right to remove him for a cause not appearing in the charge preferred, and not embraced in the issue that was tried. They could not convict him of one thing, and remove him for another. If they convicted him of making an illegal arrest, they could not remove him on that ground, and on one or more other grounds not embraced in the charge nor covered by the evidence; yet this is what the commissioners, according to their return, actually did. Their minutes, which are part of the return, show that, at the close of the evidence, a motion was made, seconded, and unanimously carried, "that Officer Shuster be dismissed from the force for incompetency and trying to deceive the board." According to this statement of their official action, which is all that appears on the subject in their original minutes, the commissioners do not appear to have convicted the relator upon the charge preferred, or to have dismissed him on that ground, but upon two independent grounds, as to neither of which was there a trial or hearing. In another part of their return, however, the commissioners state that, "after the testimony had been taken, the board unanimously found the relator guilty of the charges, and dismissed him from the force because of such finding, and for incompetency and endeavoring to deceive the board." This was not an entry upon their minutes or a record made at the time of their official action, but a statement framed in response to the command of the writ of certiorari.

Assuming that the charge of making an illegal arrest was sufficient to justify a conviction, and assuming also that the board actually convicted the relator of that offense, still no charge of incompetency or endeavoring to deceive the board was made against him, and he was neither tried nor convicted upon either of those grounds. Yet the learned commissioners themselves say that they removed him for incompetency and an attempt to deceive them, which were not charged, as well as for an illegal arrest, which was charged. The punishment which they inflicted was the most severe that the law authorizes, and we are compelled to assume that, in fixing the penalty to be inflicted, the incompetency and deceit had an influence upon their minds. If it did not, why did they say so in their return, and why did they formally enter upon their minutes the charges not preferred and never tried, as the only grounds upon which they acted in dismissing the relator from the force?



We can hardly conceive that the commissioners, as reasonable men, would dismiss a patrolman who was in good standing, so far as the record discloses, simply because he made an honest mistake in arresting a man without a warrant when he had no right to do so. The arrest was not accompanied by actual violence, nor by any aggravating or annoying conduct, and the prisoner was deprived of his liberty for only a short time. Even if a dismissal, based solely upon a conviction for making the arrest, would be a reasonable punishment, under the circumstances, the record does not permit the inference that the removal was founded upon that charge alone, for the commissioners say that they dismissed him for other reasons also. The return compels us to conclude that, in fixing the punishment to be inflicted, they were influenced to some extent, at least, by the "incompetency" and the effort at deceit, in relation to which there was neither charge preferred nor trial had. As we have recently said: "The relator was not subject to removal except for some legal cause, to be ascertained and adjudged as matter of fact upon a hearing." *People v. Police Commissioners*, 155 N. Y. 40, 44, 49 N. E. 257. Yet he has been adjudged guilty of one offense, and removed for three offenses, of two of which it does not appear that he had ever heard. We think that the commissioners exceeded their power, and that the order appealed from should be reversed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, and MARTIN, JJ., concur with VANN, J., for reversal. GRAY, J., concurs with HAIGHT, J., for affirmance.

Order reversed.

### 64 STATE ex rel. MEADER et al. v. SULLIVAN et al.

Supreme Court of Ohio, 1898. 58 Ohio St. 504, 51 N. E. 48,  
65 Am. St. Rep. 781.

Error to circuit court, Hamilton county.

Petition for writ of quo warranto by the state, on the relation of Meader and others, against John J. Sullivan and others. A demurrer to the answer was overruled, and the petition dismissed. Relators bring error. Affirmed.

The action below was in quo warranto, brought by the prosecuting attorney of the county of Hamilton against the defendant in error Sullivan and John Zumstien, Louis Werner, and George M. Roe. Its purpose was to oust respondents from the office of board of supervisors of the city of Cincinnati, and to induct the relators. The gravamen of the petition is that the respondents had been removed from office by the mayor of the city by virtue of section 2690m, Rev. St. 1897, after a hearing upon charges preferred, and yet respondents continued to intrude therein. \* \* \*

SPEAR, C. J. (after stating the facts). Two questions are presented. One relates to the sufficiency of the charges; the other to the action

of the mayor upon them. The holding of the circuit court is rested upon the former consideration.

Section 2690m, Rev. St. 1897, gives authority to the mayor to appoint the board of supervisors, and also to remove. The latter authority is in these words: "For neglect of duty or misconduct in office, the mayor of such city may remove any member of said board." This language, taken by itself, may imply an arbitrary power of removal. But that the power is not wholly arbitrary is well settled in this state by the cases of *State v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228, and *State v. Bryson*, 44 Ohio St. 457, 8 N. E. 470. Nor can its exercise be lawfully attempted until substantial charges involving neglect of duty or official misconduct have been preferred. It is held in the former case, as applicable to a removal by the Governor, that the charges must embody facts which, in judgment of law, constitute official misconduct, and no reason is perceived why the same strict test should not apply in the case of removal by a mayor.) While it is true that the holding of office is not compulsory, and the citizen is at liberty to accept or decline, as seems to him best, yet considerations of patriotism and public policy incline the disinterested citizen to accept, and it is manifestly for the interest of the state that men of character should be found willing to fill, public positions. Such citizens will be less likely to do so if they are to be subjected to arbitrary removal, or their reputations put in jeopardy by removal based upon insufficient charges. The public interests do not require action which shall be unjust to a worthy officer, or which will unfairly smirch a good character; and yet the public interests do require prompt action in case of established inefficiency or corruption. And so our statutes have provided remedies as to removals which, while they do not lodge power in the removing authority which is absolutely arbitrary, do give power which partakes of that character.

In a case under the statute in question the mayor is the sole judge of the weight and sufficiency of the evidence given at the hearing. If he hears a complaint of neglect of duty or misconduct in office, upon adequate charges, and upon evidence tending to establish them, by him adjudged sufficient, removes the officer, his action is practically final, since no appeal lies, nor can error be prosecuted. Hence the necessity, in justice and common fairness, of his being authorized to proceed only when charges have been made which embody facts that, in judgment of law, constitute neglect of duty or misconduct in office. As said by Mechem in his work on Public Officers (section 452): "The power of removal so conferred must be confined within the limits prescribed for it, and must be pursued with strictness. Hence it can be exercised only for the cause specified and in the manner and upon the conditions fixed." See, also, *Com. v. Slifer*, 25 Pa. 23, 64 Am. Dec. 680. And, with equal propriety may it be added that the finding and order should be so definite as to show upon the face of them, that the power has been exercised according to law. This for the reason, among others, that the power exercised by the mayor is not judicial

power, and the presumptions which attach to the record of courts are not to be applied in the same liberal sense to the record of the mayor. In *McGreger v. Supervisors*, 37 Mich. 388, it is held by Cooley, C. J., that "the removal from public office is a matter of serious consequence, and it is plain that all the facts which would justify it ought properly to be of record."

The charges here are that Sullivan knew, or should have known, that the tangible property, real and personal of the street railway company, subject to taxation, was \$10,000,000. Yet he willfully consented to approve the valuation of personal property at \$835,230, and realty at \$350,000, when he knew that the value of the said taxable property was not less than \$10,000,000; with bad intent, etc. A similar allegation is made as to the property of the gas company. But the board, acting as a board of equalization, had, under the statutes, no duty to perform respecting real estate, its power of equalization being confined wholly to personal property; and why the confusing element as to real estate was incorporated in the charges must be left to conjecture. It so confuses the allegation that its meaning is fatally obscure. There is no statement that Sullivan or the board undervalued the personal property, for there is no language equivalent to an averment that the personalty of the railway company was in fact of higher value than \$835,230. The valuation in gross appears by the charges to have been much too low. But it may be, for anything that these charges show to the contrary, that the undervaluation was wholly on the real estate. So that, as conclusion, every word in the charges as made may have been true as therein alleged, and yet no neglect of duty would be shown.

The finding of the mayor is simply that "Sullivan has been guilty of neglect of duty." This finding, being general, cannot be extended by implication to involve a conclusion more comprehensive or specific than the language of the charges; and this, as we have found, means only that as to the whole property there was undervaluation. In other words, the legal meaning of the finding and order is that, in the judgment of the mayor, the defendant was guilty of neglect of duty because he had permitted undervaluation of the property in gross, and cannot be held equivalent to a finding that he had been so guilty with respect to that part only of the property of which the board had jurisdiction. It seems to us manifest that, considering the arbitrary character of the power brought into exercise in this case, the charges were too indefinite to justify a trial, and that, unaided by a specific finding showing in what the neglect of duty consisted, the entire record is not sufficient to support an order of removal.

Upon the other branch of the case it will be noted that the answer avers that at the trial "not a word of evidence tending to sustain the truth of the facts alleged in said charges, or either of them, was adduced or heard by said mayor, and that no statement or information of any personal or official knowledge of the mayor, of any kind, tending to substantiate or prove the facts alleged in said charges, or either of



them, was made or communicated to this defendant." It will be further noted that in his order the mayor recites that, "I find from the evidence, and also from the facts within my personal knowledge," etc. As stated elsewhere, the power given the mayor is not judicial within the meaning of the Constitution, yet, as already found, it is not to be exercised arbitrarily; that is, a hearing is to be given the accused, and he is to have the opportunity to refute what is adduced against him. So that it would not be a proper exercise of power for the mayor to determine the truth of a charge on his own personal knowledge without making that publicly known, and offering the opportunity above alluded to. If the averment that not a word of evidence tending to sustain the truth of the facts alleged was adduced or heard by the mayor, etc., is to be taken as an averment that no testimony at all was heard, but that the mayor's finding rested entirely on facts within his personal knowledge, uncommunicated—and it is insisted by counsel for defendant in error that such is its meaning—then clearly, upon this ground, also, should the mayor's order be held invalid.

The majority of the court, at least, inclines to regard the legal effect of the averment as a conclusion of law merely; that is, that in the opinion of the pleader the evidence did not tend to sustain the truth of the charges, and that whatever statement the mayor may have made upon personal knowledge did not tend to substantiate the facts alleged.

The decision therefore is vested upon the first proposition. Judgment affirmed.<sup>55</sup>

MINSHALL, J., dissents.

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### JOYCE v. CITY OF CHICAGO.

Supreme Court of Illinois, 1905. 216 Ill. 466, 75 N. E. 184.

HAND, J. \* \* \* It is also urged that the charge filed with the the commission by the general superintendent of police is not sufficiently specific. This proceeding is not a common-law or criminal proceeding, but an investigation. While the plaintiff in error had the right to have the charge preferred against him reduced to writing, and in such form that he could clearly understand the ground assigned for his removal, it was not necessary that the charge should be formulated in technical language similar to that of a declaration or indictment.

In *State v. Common Council of the City of Superior*, 90 Wis. 612, 64 N. W. 304, charges were filed with the common council against the mayor of the city for extorting sums of money from policemen and

<sup>55</sup> "The law contemplates that the members of the board will act upon proof of some sort appropriate to the case and made a matter of record; not necessarily that they will in all cases act regardless of personal investigation, but that in case of reliance thereon the result of the investigation will be made matter of record." *State ex rel. Medical College v. Chittenden*, 127 Wis. 468, 517, 107 N. W. 500 (1906).

firemen for political purposes. After a hearing upon the charges, the common council removed the mayor from office. Under the Wisconsin statute the mayor could not be so removed "without cause, nor unless charges are preferred against him and an opportunity given him to be heard in his own defense." The court, on page 622, 90 Wis., and pages 306, 307, 64 N. W., said: "This was not a common-law trial, but an investigation. While the mayor had a right to insist that he have a fair hearing, and that the substance of the rules governing trials at law should be preserved, he cannot require that the same precision and formality be observed which are required in criminal trials at law. These principles govern the charges made, as well as the procedure. The charge does not need to be drawn with the accuracy of an indictment. It is sufficient if the accused be furnished with the substance of the charge against him." Upon the trial the plaintiff in error was represented by counsel, and no objections, as appears from the record filed as a return, were made to the written charge for indefiniteness or otherwise, and it is too late now for him to raise the objection that the complaint was not sufficiently specific.

In *State v. Kirkwood*, 15 Wash. 298, 46 Pac. 331, the relator was removed from the office of police commissioner of the city of Seattle by the mayor upon charges, and Kirkwood was appointed in his place. The relator brought suit, in the form of an information in the nature of a quo warranto, to oust Kirkwood. The court held that in a quo warranto proceeding it could examine the sufficiency of the charges, and said (page 300, 15 Wash., and page 332, 46 Pac.): "The second contention of appellant, however, viz., that the charges were sufficient to support the removal of relator, we think must be sustained. These charges may have been somewhat indefinite, but no motion was made to make them more definite or certain. No objection was made to them in any way. The appellant went to trial upon the complaint as it was, and the issues were found against him, and we think it is too late for him now to raise the objection that the complaint was indefinite and not specific. \* \* \* The complaint \* \* \* is somewhat discursive and indefinite, but we think sufficient can be gathered from the complaint to place the relator upon trial for acts which were inconsistent with the duties of a public officer." \* \* \*

### PEOPLE ex rel. McALEER v. FRENCH et al.

Court of Appeals of New York, 1890. 119 N. Y. 502, 23 N. E. 1061.

Appeal from Supreme Court, General Term, First Department.

The police commissioners of New York city dismissed the relator from the police force for intoxication. On certiorari that order was affirmed by the Supreme Court, General Term, and relator appeals.

EARL, J. The members of the police force of the city of New York have a permanent tenure of office; and they cannot be dis-

missed from the force, for any fault or misconduct, until after charges have been preferred against them, and such charges have been examined, heard, and investigated as provided in the statutes, and the rules adopted by the board of police commissioners. The following is one of the rules adopted by that board: "Any member of the police force may be punished by the board of police, in their discretion, either by reprimand, forfeiture, and withholding pay, not exceeding thirty days for any one offense, or by dismissal from the force on conviction of either of the following offenses, to wit." Among the offenses specified are intoxication, neglect of duty, and conduct unbecoming an officer. We are dealing in this case with the offense of intoxication, as that was the charge made against the relator. \* \* \* Taking the case as it appears to us, it was certainly a very severe punishment to dismiss the relator from the police force, where he had so long and faithfully served. But the extent of the punishment rested entirely in the discretion of the commissioners, and neither the Supreme Court nor this court has any jurisdiction to interfere therewith.

We think the force and effect of the decision in the Masterson Case<sup>56</sup> has been somewhat misapprehended. In determining the guilt of a police officer who is on trial for charges preferred against him, the police commissioners cannot act upon their own knowledge. The charges must be tried upon evidence, and the guilt must be established by evidence produced before the commissioners upon the trial. They can neither act upon their own knowledge, nor supplement the evidence by their own knowledge. But, in inflicting the punishment, they may take into consideration the evidence, as well as their own knowledge of the police officer, and inflict such punishment, authorized by the rules and the statutes, as, in their judgment, the case, in view of all the circumstances, requires. We did not determine in that case that the Supreme Court, upon certiorari, did not have jurisdiction to review the determination of the police commissioners upon the evidence; and it is a mistake to suppose that, if there is any evidence in the record brought to the Supreme Court by certiorari sustaining the determination of the commissioners, that court has no right to interfere therewith. Such is the rule in this court, and such was the rule at common law.

But now, by section 2140 of the Code of Civil Procedure, upon the hearing on the return of a writ of certiorari the Supreme Court may inquire whether there was any competent proof of all the facts necessary to prove in order to authorize the making of the determination, and, if there was such proof, whether there was, "upon all the evidence, such a preponderance of proof against the existence of any of those facts that the verdict of a jury affirming the existence thereof, rendered in an action in the Supreme Court triable by a

<sup>56</sup> People ex rel. Masterson v. French, 110 N. Y. 494, 18 N. E. 133 (1888). See, also, People v. Glennon, 37 Misc. Rep. 1, 74 N. Y. Supp. 794 (1902).



jury, would be set aside by the court as against the weight of evidence." Therefore, in all this class of cases, it is the duty of the Supreme Court, not only to inquire whether there is any competent proof tending to establish the guilt of the accused officer, but it must look into the evidence; and, if it finds that there is a preponderance of evidence against the determination of the commissioners, then it has the same jurisdiction to reverse the determination that it has to set aside the verdict of a jury as against the weight of evidence. It is the purpose of the law to give a review in the Supreme Court by certiorari, not only upon the law, but upon the evidence, to the extent specified in the statute; and every party who seeks such a review is entitled to the fair and judicious exercise of that jurisdiction.

We do not perceive that the relator's right to call witnesses, and have them sworn in his behalf, upon his trial, was denied or curtailed by the police commissioner who took the evidence. We are therefore constrained to affirm the order; but, under the circumstances, it must be without costs.<sup>57</sup>

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## SECTION 15.—POWER TO OBTAIN INFORMATION <sup>58</sup>

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### LANGENBERG v. DECKER.

Supreme Court of Indiana, 1892. 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 108.

Appeal from superior court, Marion county.

Proceedings in habeas corpus by Philip Decker against Henry W. Langenberg, Sheriff of Marion County. From a judgment discharging plaintiff from custody defendant appeals. Affirmed.

COFFEY, J. The General Assembly of the state passed an act, which was approved and went into force on the 6th day of March, 1891, entitled "An act concerning taxation, repealing all laws in conflict herewith, and declaring an emergency." The act creates a state board of tax commissioners, composed of five persons, viz., the Secretary of State, the Auditor of State, and the Governor of the state, who are styled ex officio members, and two persons of opposite polit-

<sup>57</sup> As to evidence in administrative proceedings generally, see John H. Wigmore in 17 Ill. Law Rev. 263; F. A. Ross in 36 Harv. Law Rev. 263 (Workmen's Compensation Commissions); Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 540 (1916); Fogarty v. National Biscuit Co., 221 N. Y. 20, 116 N. E. 346 (1917).

<sup>58</sup> As to constitutional aspects of power or lack of power, see Missouri ex rel. Hurwitz v. North, 271 U. S. 40, 46 S. Ct. 384, 70 L. Ed. 818 (1926), and vol. 21, Ill. Law Rev. 493.

The power to require an oath (to be administered by some official authorized to administer oaths) may be implied from usage. United States v. Bailey.

ical faith, appointed by the Governor of the state. \* \* \* It also contains this provision: "They shall have the power to send for persons, books, and papers, to examine records, hear and question witnesses, to punish for contempt any one who refuses to appear and answer questions by fine not exceeding one thousand dollars, and by imprisonment in the county jail of any county not exceeding thirty days, or both. Appeals shall lie to the criminal court of Marion county from all orders of the board inflicting such punishment, which appeals shall be governed by the laws providing for appeals in criminal cases from justices of the peace, so far as applicable. The sheriffs of the several counties of the state shall serve all process and execute all orders of the board."

Claiming to act under the power and authority conferred upon it by the provisions of the statute, the state board of tax commissioners, on its own motion, caused a subpoena duces tecum to be issued to all the banks in the state, requiring the president, cashier, and bookkeeper, or either of them, of the bank named in the subpoena, to appear before the board at the office of the state board of tax commissioners in the state house in the city of Indianapolis, on a day named in the subpoena, and to bring and have with them then and there such books, papers, and accounts of such banking institution as should fully disclose and show the names of all persons having money, bonds, stocks, notes, or other property of value on deposit and in the custody of such bank on the 1st day of April, 1891, and the respective amounts of such deposits or other property in the custody of the bank, and to answer all questions which might be asked in relation thereto or with reference to the property owned by the bank itself. \* \* \*

One of the subpoenas was served upon the appellee at the city of Evansville, where he resides, and where he is vice president of a state bank known as the German Bank of Evansville. In answer to the subpoena he appeared before the state board of tax commissioners

9 Pet. 238, 9 L. Ed. 113 (1835). See, also, *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415 (1894).

Power to require production of papers, etc. *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746 (1886); *State v. Davis*, 108 Mo. 666, 18 S. W. 894, 32 Am. St. Rep. 640 (1892); *St. Joseph v. Levin*, 128 Mo. 558, 31 S. W. 101, 49 Am. St. Rep. 577 (1895).

As to powers of inquisition, see *Commissioners of Enquiry*, 12 Coke, 31; article on the Corporation Commission, 11 Law Magazine 68; *University Commission*, 15 Law Magazine (N. S.) 79.

Power to require information or reports, tending to incriminate. *Com. v. Emery*, 107 Mass. 172, 9 Am. Rep. 22 (1871); *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110 (1892); *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819 (1896); *People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 253, 68 N. E. 353 (1903), overruling *People v. Kelly*, 24 N. Y. 74 (1861); *People v. Butler Street Foundry Co.*, 201 Ill. 236, 66 N. E. 349 (1903); *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652 (1906).

For general administrative power to obtain information (not to be found in English or American law), see General Administrative Act of Prussia of July 30, 1883, § 119: "The administrative authorities have power, even in other cases than those expressly designated by law, to summon parties in interest or their authorized representatives to an oral hearing for the purpose of ascertaining facts."

on the 25th day of August, 1891, when there were present of the members of the board the following persons, and others, viz., Claude Matthews, Secretary of State, acting as president of the board, J. O. Henderson, Auditor of State, and Ivan N. Walker.

Upon his appearance he was duly sworn, when the following proceedings were had, viz.: "Question. State your name and place of residence. Answer. Philip C. Decker. I reside in the city of Evansville. Q. In what business are you engaged? A. That of banking. Q. With what institution are you engaged, and in what capacity? A. I am vice president of the German Bank of Evansville, Indiana. The president lately died, and I am acting as president. Our bank was organized under the laws of Indiana. Q. State the aggregate amount of the individual deposits held by the German Bank, of which you are vice president, on the 1st day of April, 1891. A. About \$300,000. Q. Give the amount of money held on deposit by said bank on the 1st day of April, 1891, belonging to some one depositor. The Witness: Before answering the question, I respectfully ask the board whether there is any appeal, complaint, suit, or proceeding of any kind pending before this board or elsewhere to assess any depositor, or to revise his tax list in any manner. By the Board: No. We are exercising the power of discovery. The Witness: I decline to answer, under the advice of counsel, either as to the name of any depositor or the amount of his deposit. \* \* \* " 59

Thereupon the state board of tax commissioners, because of the refusal of the appellee to appear and answer the questions above set forth, and to give the information thereby sought to be elicited, assessed against him a fine of \$500, and that he stand committed until the fine be paid or replevied, and entered the following judgment: "Therefore it is considered and ordered by the state board of tax commissioners that Philip C. Decker, on account of his refusal to appear and answer questions, and his disobedience to the order of this board, be, and hereby is, fined in the sum of five hundred dollars (\$500); and it is further considered by the board that said Philip C. Decker do stand committed to the jail of Marion county, Indiana, until said fine be paid or replevied."

Upon entering the foregoing judgment, the secretary of the board delivered to the appellant, as the sheriff of Marion county, a commitment reciting the fact that the appellee had been fined the sum of \$500 for contempt, and ordering that he be committed to the jail of Marion county until discharged by due process of law. Upon this commitment the appellee was arrested. He thereupon filed his petition in the Marion superior court, praying for a writ of habeas corpus. To the writ issued upon this petition the appellant made his return, stating, among other things, substantially the proceedings above set forth. To this return the appellee filed exceptions, which were sustained by the court, and an order was entered discharging the appellee from custody.

. 59 A number of similar questions and answers followed, which are omitted.  
FR.ADM.LAW (2D ED.)—16



The assignment of error calls in question the propriety of the ruling of the Marion superior court in sustaining the exceptions to the return made by the appellant to the writ of habeas corpus. It is contended by the appellee: First. That the power to punish for contempt is a judicial function, which can only be exercised by a court, and, if it be claimed that the act in question makes the state board of tax commissioners a court, then so much of the act as seeks to do so is void, because it is not embraced in the title of the act, and because three of the persons constituting the board are forbidden by the constitution of the state from exercising judicial functions. Second. That, if the board has power to punish for contempt, it can only do so for the refusal of a witness to appear and answer questions pertinent and material to some issue in a suit, action, or proceeding then pending. Third. That the proceedings of the board in this matter are in violation of the provisions of the Constitution of the United States, which provides that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon reasonable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." Fourth. That the state board of tax commissioners has no original jurisdiction, except in the matter of the assessment of railway corporations, and equalizing the assessments of real estate.

These several propositions have been ably and exhaustively argued on both sides, not only in the briefs on file, but also orally in open court; but it seems to us that, if the first proposition presented by the appellee, namely, that so much of the statute in question as attempts to confer on the state board of tax commissioners the power to fine and imprison for contempt of its authority is void by reason of being in conflict with the state constitution, can be sustained, the other questions presented do not necessarily or properly arise. If this position cannot be maintained, then some or all of the other propositions do arise, and must be decided by this court. But the first inquiry in a case like this leads naturally to an investigation of the authority under which the complaining party has been deprived of his liberty. The solution of the question presented renders it necessary that we shall inquire—First, as to what department of the state government the state board of tax commissioners belongs; and, second, into the nature of the power to fine and commit for contempt.

\* \* \*

It is often a matter of much difficulty to determine whether the functions exercised by a tribunal of this character are such as pertain exclusively to the courts, or whether they are such as it may lawfully exercise. Mr. Mechem on Public Office and Officers (section 637) says: "Quasi judicial functions \* \* \* are those which lie midway between the judicial and ministerial ones. The line separating them from such as are thus on their two sides are necessarily indistinct; but, in general terms, when the law in words or by impli-

cation commits to any officer the duty of looking into facts, but after a discretion in its nature judicial, the function is termed quasi judicial."

That it was in the power of the General Assembly to confer on the state board of tax commissioners the power to hear and determine appeals from the county boards of review, to equalize the assessments of real estate, and to assess the railroad property named in the act, is not doubted; and the question as to whether the Legislature could confer upon it the power to fine and imprison the citizens of the state for contempt of its authority depends upon whether such action is purely judicial or only quasi judicial. A proceeding against a person as for a contempt is ordinarily in the nature of a criminal proceeding, and statutes authorizing punishment for contempt of the authority of a tribunal are criminal statutes, and are to be strictly construed. *Maxwell v. Rives*, 11 Nev. 213; *Holman v. State*, 105 Ind. 513, 5 N. E. 556.

In the case of *Ex parte Doll*, 7 Phila. (Pa.) 595, Fed. Cas. No. 3,968, in discharging the prisoner, who had been committed by a commissioner appointed by the United States Circuit Court as for a contempt for refusing to appear and testify and produce certain books, the court said: "I very much doubt the power of Congress to invest a commissioner with authority in a proceeding originally brought before him to summarily commit a citizen for alleged contempt. This was an exercise of the judicial power of the United States, which, under the Constitution, could not be intrusted to an officer appointed and holding his office in the manner in which they were appointed and held their offices."<sup>60</sup>

Again, in the celebrated case of *Kilbourn v. Thompson*, 103 U. S. 182, 26 L. Ed. 377, involving the question of the power of Congress to arrest and punish a witness for contempt in refusing to answer questions before a committee of the house, Justice Miller, in speaking for the court said: "The Constitution declares that no person shall be deprived of his life, liberty, or property without due process of law, and it has been repeatedly held by the United States Supreme Court that this means a trial in which the rights of the party shall be decided by a court of justice, appointed by law, and governed by the rules of law previously established."

So again, in the case of *In re Mason* (D. C.) 43 Fed. 510, in which Mason had been committed by a United States circuit court commissioner for contempt in failing to appear and testify as a witness, the court said: "To arrest and punish for a contempt is the highest exercise of judicial power, and belongs to judges of courts of record or superior courts. Where jurisdiction exists there can be no review. A pardon by the executive is in most cases the mode of release. This power is not, and never has been, an incident to the mere exercise of

<sup>60</sup> See, also, *United States v. Beavers* (D. C.) 125 Fed. 778 (1903).

judicial function, and such power cannot be upheld upon inference and implication, but must be expressly conferred by law."

As bearing upon the question now under discussion, see, also, *In re McLean* (D. C.) 37 Fed. 648; *Anderson v. Dunn*, 6 Wheat. 204, 5 L. Ed. 242; *Shoultz v. McPheeters*, 79 Ind. 373; *Vandercook v. Williams*, 106 Ind. 345, 1 N. E. 619, 8 N. E. 113; *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281; *Gregory v. State*, 94 Ind. 385, 48 Am. Rep. 162; *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502.

These cases lead to the inevitable conclusion that the power to punish for contempt belongs exclusively to the courts, except in cases where the Constitution of a state expressly confers such power upon some other body or tribunal. Our state Constitution confers such power upon the General Assembly, but upon no other body. The doctrine that such power rests with the courts alone is based upon the fact that a party cannot be deprived of his liberty without a trial. To adjudge a person guilty of contempt for a refusal to answer questions, the tribunal must determine whether such questions are material, and whether it is a question which the witness is bound to answer; otherwise it cannot be determined that the witness is in contempt of its authority in refusing to answer.

So far as we are informed, the trial of a citizen, involving the question of his liberty, by any civil tribunal other than a court, has never been sustained, unless the power to do so was conferred by some constitutional provision. For the reasons above given, our conclusion is that so much of the act under consideration as attempts to confer on the state board of tax commissioners power to fine and imprison for contempt is in violation of section 1, art. 3, of our state Constitution, and is void. It follows that such board has no authority to fine the appellee, and commit him to the jail of Marion county, and that the Marion superior court did not err in ordering his release. \* \* \*

Judgment affirmed.<sup>61</sup>

<sup>61</sup> See *Matter of Sims*, 54 Kan. 1, 37 Pac. 135, 25 L. R. A. 110, 45 Am. St. Rep. 261 (1894); *De Camp v. Archibald*, 50 Ohio St. 618, 35 N. E. 1056, 40 Am. St. Rep. 692 (1893); *State ex rel. Haughey v. Ryan*, 182 Mo. 349, 81 S. W. 435 (1904).

"It is true that some persons have power to commit, who are not judges, as a constable may commit for an affray committed in his presence; and he is liable to an action if the act is false. The difference is that he does not commit for punishment, but for safe custody." *Groenvelt v. Burwell*, 1 Ld. Raym. 454, 467 (1699).



## INTERSTATE COMMERCE COMMISSION v. BRIMSON et al.

Supreme Court of United States, 1894. 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This was a petition by the Interstate Commerce Commission for an order requiring W. G. Brimson, J. S. Keefe, and W. R. Sterling to appear before the commission and answer certain questions, and requiring Keefe and Sterling to produce before the commission certain books. The Circuit Court dismissed the petition. 53 Fed. 476. The commission appealed.

Mr. Justice HARLAN. This appeal brings up for review a judgment rendered December 7, 1892, dismissing a petition filed in the Circuit Court of the United States on the 15th day of July, 1892, by the Interstate Commerce Commission, under the act of Congress entitled "An act to regulate commerce," approved February 4, 1887, and amended by the acts of March 2, 1889, and February 10, 1891. 24 Stat. 379, c. 104; 25 Stat. 855, c. 382; 26 Stat. 743, c. 128; 1 Supp. Rev. St. 529, 684, 891 (U. S. Comp. St. 1901, p. 3154).

The petition was based on the twelfth section of the act authorizing the commission to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses, and the production of documents, books, and papers.

The Circuit Court held that section to be unconstitutional and void, as imposing on the judicial tribunals of the United States duties that were not judicial in their nature. In the judgment of that court, this proceeding was not a case to which the judicial power of the United States extended. 53 Fed. 476, 480. \* \* \*

The twelfth section (26 Stat. 743, c. 128), the validity of certain parts of which is involved in this proceeding, provides as follows:

"That the commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States;

and for the purposes of this act the commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

"Such attendance of witnesses and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission, or any party to a proceeding before the commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

"And any of the Circuit Courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

\* \* \*

J. S. Keefe, secretary and auditor of the five roads mentioned, was examined by the commission as a witness. He admitted that he had in his possession a book showing the names of the stockholders of the Calumet & Blue Island Railway Company, but refused, upon the demand of the commission, to produce it. He also refused to answer the question, "Do you know, as a matter of fact, whether the Illinois Steel Company owns the greater part of the stock of these several railroads?"

William R. Sterling, first vice president of the Illinois Steel Company, was also examined as a witness, and, after stating that that company had a contract with the five railroads in question to handle the railroad business at the five "plants" of the steel company, refused to answer the question, "Is that the only relation which your company sustains to these railroad companies?"

On the succeeding day the commission issued a subpoena duces tecum, directed to J. S. Keefe, secretary and auditor of the five railroads in question, commanding him to appear before that body, and bring with him the stock books of those companies. A like subpoena was issued to William R. Sterling, as first vice president of the steel company, commanding him to appear before the commission and produce the stock books of that company. Keefe and Sterling appeared in answer to the subpoenas, but refused to produce the books, or either of them, so ordered to be produced.

The commission thereupon, on the 15th day of July, 1892, presented to and filed in the court below its petition, embodying the above facts, and prayed that an order be made requiring and commanding Brimson, Keefe, and Sterling to appear before that body and answer the several questions propounded by them, and which they had respectively refused to answer, and requiring Keefe and Sterling to appear and produce before the commission the stock books above referred to as in their possession.

The answers of Brimson, Keefe, and Sterling in the present proceeding, besides insisting that the questions propounded to them, respectively, were immaterial and irrelevant, were based mainly upon the ground that so much of the interstate commerce act as empowered the commission to require the attendance and testimony of witnesses and the production of books, papers, and documents, and authorizes the Circuit Court of the United States to order common carriers or persons to appear before the commission and produce books and papers and give evidence, and to punish by process for contempt any failure to obey such order of the court, was repugnant to the Constitution of the United States.

Is the twelfth section of the act unconstitutional and void, so far as it authorizes or requires the Circuit Courts of the United States to use their process in aid of inquiries before the commission? The court recognizes the importance of this question, and has bestowed upon it the most careful consideration.

As the Constitution extends the judicial power of the United States to all cases in law and equity arising under that instrument or under the laws of the United States, as well as to all controversies to which the United States shall be a party (article 3, § 2), and as the Circuit Courts of the United States are capable, under the statutes defining and regulating their jurisdiction, of exerting such power in cases or controversies of that character, within the limits prescribed by Congress (25 Stat. 434, c. 866), the fundamental inquiry on this appeal is whether the present proceeding is a "case" or "controversy," within the meaning of the Constitution. The Circuit Court, as we have seen, regarded the petition of the Interstate Commerce Commission as nothing more than an application by an administrative body to a judicial tribunal for the exercise of its functions in aid of the execution of duties not of a judicial nature, and accordingly adjudged that this proceeding did not constitute a case or controversy to which the judicial power of the United States could be extended.

At the same time the learned court said: "Undoubtedly, Congress may confer upon a nonjudicial body authority to obtain information necessary for legitimate governmental purposes, and make refusal to appear and testify before it touching matters pertinent to any authorized inquiry an offense punishable by the courts, subject, however, to the privilege of witnesses to make no disclosures which might tend to criminate them or subject them to penalties or forfeitures. A prosecution or an action for violation of such a statute would clear-



ly be an original suit or controversy between parties, within the meaning of the Constitution, and not a mere application, like the present one, for the exercise of the judicial power in aid of a nonjudicial body." In *re Interstate Commerce Commission* (C. C.) 53 Fed. 476, 480.

In other words, if the interstate commerce act made the refusal of a witness duly summoned to appear and testify before the commission, in respect to a matter rightfully committed by Congress to that body for examination, an offense against the United States, punishable by fine or imprisonment, or both, a criminal prosecution or an information for the violation of such a statute would be a case or controversy to which the judicial power of the United States extended; while a direct civil proceeding, expressly authorized by an act of Congress, in the name of the commission, and under the direction of the Attorney General of the United States, against the witness so refusing to testify, to compel him to give evidence before the commission touching the same matter, would not be a case or controversy of which cognizance could be taken by any court established by Congress to receive the judicial power of the United States.

This interpretation of the Constitution would restrict the employment of means to carry into effect powers granted to Congress within much narrower limits than, in our judgment, are warranted by that instrument. \* \* \*

The question so presented is substantially, if not precisely, that which would arise if the witness was proceeded against by an indictment under an act of Congress declaring it to be an offense against the United States for any one to refuse to testify before the commission after being duly summoned, or to produce books, papers, etc., in his possession upon notice to do so, or imposing penalties for such refusal to testify or to produce the required books, papers, and documents. A prosecution for such offense, or a proceeding by information to recover such penalties, would have as its real and ultimate object to compel obedience to the rightful orders of the commission, while it was exerting the powers given to it by Congress; and such is the sole object of the present direct proceeding. The United States asserts its right, under the Constitution and laws, to have these appellees answer the questions propounded to them by the commission, and to produce specified books, papers, etc., in their possession or under their control. It insists that the evidence called for is material in the matter under investigation; that the subject of investigation is within legislative cognizance, and may be inquired of by any tribunal constituted by Congress for that purpose. The appellees deny that any such rights exist in the general government, or that they are under a legal duty, even if such evidence be important or vital in the enforcement of the interstate commerce act, to do what is required of them by the commission. Thus has arisen a dispute involving rights or claims asserted by the respective parties to it; and the power to determine it directly, and, as between the parties,

finally, must reside somewhere. It cannot be that the general government, with all the power conferred upon it by the people of the United States, is helpless in such an emergency, and is unable to provide some method, judicial in form and direct in its operation, for the prompt and conclusive determination of this dispute. \* \* \* <sup>62</sup>

The views we have expressed in the present case are not inconsistent with anything said or decided in those cases. They do not in any manner infringe upon the salutary doctrine that Congress, excluding the special cases provided for in the Constitution—as, for instance, in section 2 of article 2 of that instrument—may not impose upon the courts of the United States any duties not strictly judicial. The duties assigned to the Circuit Courts of the United States by the twelfth section of the interstate commerce act are judicial in their nature. The inquiry whether a witness before the commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession, and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular instances enumerated in the Constitution, and considered in *Anderson v. Dunn*, 6 Wheat. 204, 5 L. Ed. 242 and in *Kilbourn v. Thompson*, 103 U. S. 168, 190, 26 L. Ed. 377, of the exercise by either house of Congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses and the production of papers in election and impeachment cases and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises. See *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502, and authorities there cited.

Without the aid of judicial process of some kind, the regulations that Congress may establish in respect to interstate commerce cannot be adequately or efficiently enforced. One mode, as already suggested (the validity of which is not questioned), of compelling a witness to testify before the Interstate Commerce Commission to answer questions propounded to him relating to the matter under investigation, and which the law makes it his duty to answer, and to produce books, papers, etc., is to make his refusal to appear and answer; or to produce the documentary evidence called for, an offense against the United States, punishable by fine or imprisonment. A criminal prosecution of the witness under such a statute, it is con-

<sup>62</sup> The court refers to *Gordon v. United States*, 117 U. S. 697 (1864), and *In re Sanborn*, 148 U. S. 222, 13 Sup. Ct. 577, 37 L. Ed. 429 (1893), holding that there is no judgment in the legal sense of the term, when the action of the courts is subject to be set aside by another department of the government.

ceded, would be a case or controversy, within the meaning of the Constitution, of which a court of the United States could take jurisdiction. Another mode would be to proceed by information to recover any penalty imposed by the statute. A proceeding of that character, it is also conceded, would be a case or controversy of which a court of the United States could take cognizance. If, however, Congress, in its wisdom, authorizes the commission to bring before a court of the United States for determination the issues between it and a witness, that mode of enforcing the act of Congress, and of compelling the witness to perform his duty, is said not to be judicial, and is beyond the power of Congress to prescribe.

We cannot assent to any view of the Constitution that concedes the power of Congress to accomplish a named result indirectly, by particular forms of judicial procedure, but denies its power to accomplish the same result directly, and by a different proceeding judicial in form. We could not do so without denying to Congress the broad discretion with which it is invested by the Constitution of employing all or any of the means that are appropriate or plainly adapted to an end which it has unquestioned power to accomplish; namely, the protection of interstate commerce against improper burdens and discriminations. Indeed, of all the modes that could be constitutionally prescribed for the enforcement of the regulations embodied in the interstate commerce act, that provided by the twelfth section is the one which, more than any other, will protect the public against the devices of those who, taking advantage of special circumstances, or by means of combinations too powerful to be resisted and overcome by individual effort, would subject commerce among the states to unjust and unreasonable burdens.

The present proceeding is not merely ancillary and advisory. It is not, as in *Gordon's Case*, one in which the United States seeks from the Circuit Court of the United States an opinion that "would remain a dead letter, and without any operation upon the rights of the parties." The proceeding is one for determining rights arising out of specified matters in dispute that concern both the general public and the individual defendants. It is one in which a judgment may be rendered that will be conclusive upon the parties until reversed by this court; and that judgment may be enforced by the process of the Circuit Court. Is it not clear that there are here parties on each side of a dispute involving grave questions of legal rights, that their respective positions are defined by pleadings, and that the customary forms of judicial procedure have been pursued? The performance of the duty which, according to the contention of the government, rests upon the defendants, cannot be directly enforced except by judicial process. One of the functions of a court is to compel a party to perform a duty which the law requires at his hands. If it be adjudged that the defendants are, in law, obliged to do what they have refused to do, that determination will not be merely ancillary and advisory, but, in the words of *Sanborn's Case*, will be a



"final and indisputable basis of action," as between the commission and the defendants, and will furnish a precedent in all similar cases. It will be as much a judgment that may be carried into effect by judicial process as one for money, or for the recovery of property, or a judgment in mandamus commanding the performance of an act or duty which the law requires to be performed, or a judgment prohibiting the doing of something which the law will not sanction. It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution.

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For the reasons stated, the judgment is reversed, and the cause is remanded for further proceedings in conformity with this opinion. Reversed.

Mr. Justice FIELD was not present at the argument, and took no part in the consideration or decision of this case. Mr. Chief Justice FULLER, Mr. Justice BREWER, and Mr. Justice JACKSON, dissent.

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### In re DAVIES, Atty. Gen.

Court of Appeals of New York, 1901. 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855.

Appeal from Supreme Court, Appellate Division, Third Department.

In the matter of the petition of John C. Davies, Attorney General, for an order directing Charles W. Morse and others to appear before a referee for examination. From an order of the Appellate Division (55 App. Div. 245, 67 N. Y. Supp. 492), reversing an order of the Special Term denying a motion to vacate and set aside an order directing said Morse and others to appear and be examined under Laws 1899, c. 690, and which vacated such order, the Attorney General appeals. Reversed, and order of Special Term affirmed.

VANN, J. \* \* \* The statute which gives rise to this controversy is entitled "An act to prevent monopolies in articles or commodities of common use, and to prohibit restraints of trade and commerce, providing penalties for violations of the provisions of this act, and procedure to enable the Attorney General to secure testimony in relation thereto." Laws 1899, c. 690. \* \* \*

It authorizes the Attorney General to bring an action in the name of the people against any corporation, foreign or domestic, its officers or agents, or against any person, "to restrain and prevent the doing in this state of any act herein declared to be illegal, or any act, in,

<sup>63</sup> See, also, *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (C. C.) 37 Fed. 567, 613, 614, 2 L. R. A. 289 (1889).

toward or for the making or consummation" of any prohibited contract or combination, wherever the same may have been made. Section 3.

It declares that "whenever the Attorney General has determined to commence an action" under the act, before beginning the same he may present to any justice of the Supreme Court an application in writing for an order directing the persons mentioned therein to appear before such justice "or a referee designated in such order, and answer such questions as may be put to them, \* \* \* and produce such papers, documents and books concerning any alleged illegal contract" or combination in violation of the act. Said application "may simply show upon" the "information and belief" of the Attorney General "that the testimony of such person or persons is material and necessary." It is made the duty of the justice to grant the application, with such preliminary injunction as may appear to him to be proper and expedient, and of the witness to attend at the time and place designated. "The testimony of each witness must be subscribed by him, and all must be filed in the office of the clerk of the county in which such order for examination is filed." The provisions of the Code of Civil Procedure relating to the examination of witnesses before the commencement of an action "shall not apply except as herein prescribed." Section 4.

The order must be signed by the justice making it, and the Attorney General may indorse upon the same "a clause requiring such person to produce on such examination all books, papers and documents in his possession, or under his control, relating to the subject of such examination." Section 5.

No person is "excused from answering any questions or from producing any books" because the evidence, documentary or otherwise, may tend to incriminate him, but he is protected from criminal prosecution and from any penalty or forfeiture "on account of any transaction, matter or thing concerning which he may testify, or produce" documentary evidence. Section 6.

The referee so appointed is given "all the powers and is subject to all the duties of a referee appointed under section 1018 of the Code of Civil Procedure, so far as practicable, and may punish for contempt a witness duly served as prescribed in this act for nonattendance or refusal to be sworn or to testify, or to produce books," documents, etc., "in the same manner, and to the same extent as a referee appointed to hear, try and determine an issue of fact or of law." Section 7.

Pursuant to this act the Attorney General presented to a justice of the Supreme Court, at chambers, his petition, verified upon information and belief, in which he stated that "as such officer" he had determined to commence an action under said statute in the name of the people against the American Ice Company, a foreign corporation engaged in business in the state of New York, and against its officers and directors, to restrain them "from doing in this state any act

in, towards, or for the making or consummation of" a certain contract or combination, "and from doing business in the state of New York, and to vacate, annul, and set aside the certificate procured from the Secretary of State, pursuant to section 15 of the general corporation law, authorizing said company to do business in the state of New York." \* \* \*

The petitioner set forth the names of 28 persons, and alleged that the testimony of each was "material and necessary to the establishment of the unlawful agreement, arrangement, or combination whereby the above-described monopoly in the sale of ice was created and established and has been maintained." The remaining allegations of the petition show the relations of some of the proposed witnesses to the American Ice Company, the opportunity of others for knowing about the combination, and of others still for knowing about other companies in the city of New York whose business had been absorbed by the constituent companies, and through them by the American Ice Company. It is also alleged that the principal office of the American Ice Company is located in the city of New York, and the source of the petitioner's knowledge and the grounds of his belief as to the truth of the allegations of the petition are briefly stated. The relief asked is that an order be made directing the persons named to appear before a referee, "and answer such questions as may be put to them, or any of them, and produce all papers, documents, and books concerning the aforesaid illegal arrangement, agreement, or combination."

Upon the presentation of this petition the justice made an order requiring Charles W. Morse, who is president of the American Ice Company, and the other persons named, to appear before a referee for the purpose of the examination provided for by the act. Mr. Morse was also directed to produce "all contracts and agreements of the American Ice Company with" 12 other ice companies, as well as certain other contracts relating to the purchase of ice and the plants, business, and good will of ice dealers in the city of New York. He moved to vacate the order, and thus the questions arose that we are called upon to review. \* \* \*

The validity of the procedure authorized by the act, however, is challenged as in violation of both the state and federal Constitutions. The first and second questions certified involve the proposition that the statute imposes other than judicial duties upon a judicial officer, and that for this reason the provisions relating to the procedure are unconstitutional and void. \* \* \*

While the performance of administrative duties cannot be imposed by the Legislature upon the Supreme Court as such, except as to matters incidental to the exercise of judicial powers, yet for many years, and without serious question, acts have been passed conferring upon the justices of that court authority, out of term, to perform a variety of functions, administrative or semiadministrative in character, such as the approval of certificates of incorporation, the acknowledg-



ment of conveyances, the solemnization of marriages, the appointment of commissioners of jurors, the investigation of the financial affairs of villages, and the like. 2 Rev. St. p. 755, § 4; Laws 1847, p. 319, § 1; Laws 1892, c. 682, § 64; Id., c. 685; Laws 1897, c. 194; Id., c. 430. A distinction seems to prevail in practice between powers conferred upon a court and those conferred upon the judges thereof.

The duties of the justice to whom application was made for the order in question were judicial in form. He was not required to grant it as a matter of course, although the language used is mandatory upon its face, as it was in *Jenkins v. Putnam*, 106 N. Y. 272, 12 N. E. 613, yet we declared that: "While it is said in section 873, Code Civ. Proc., that the judge 'must' grant an order when an affidavit conforming to the requirements of the previous section is presented to him, yet we do not think that the language is absolutely mandatory, and that it was intended to deprive the judge of all discretion. \* \* \* Where the judge can see that the examination is sought merely for annoyance or for delay, and that it is not in fact necessary and material, he ought not to be required, and cannot absolutely be required, to make the order."

The expressions in the statute, "it shall be the duty of the justice \* \* \* to grant such application," and "the order shall be granted by the justice," do not deprive him of the power to decide whether, upon the facts alleged, the order should be granted. It was his duty to consider the allegations of the petition, and decide whether they made out a case pursuant to the statute, and authorized an order of examination according to its provisions. It was necessary for him to be satisfied judicially that the Attorney General had, in good faith, determined to commence an action, and whether the testimony of the persons named was material and necessary in connection with that action. The statute is not satisfied by a simple statement of the Attorney General in his petition that he is informed and believes that the testimony of such persons is material and necessary, but he must show how and why it is material and necessary. This involves the general nature and object of the action that he has determined to bring. A determination to bring an action, indefinite and undefined, is not what the Legislature contemplated, but one the general character of which is described sufficiently to show that it is founded upon the statute as well as upon probable cause, and that the testimony of the witnesses will be material and necessary therein. Thus the justice is called upon to exercise the judicial function of deciding whether the application conforms to the statute as thus construed, the same as is required of him when an application is made for an order of arrest, a warrant of attachment, or any other provisional remedy. His duty is not merely clerical, but requires the exercise of judgment. When a writ of habeas corpus is applied for, the statute says that the judge "must grant it without delay," and even inflicts a penalty for failure to comply with the command, yet it is his duty to refuse the writ unless the facts required by the code are sufficiently

set forth. Code Civ. Proc. § 2020. In all these cases the judge is required to act judicially, for he must decide the question of law whether the facts alleged make out a case under the statute.

But, while the power committed to the justice is judicial in form, unless it is judicial in substance, and has a judicial purpose to accomplish, the duty is of an administrative character only. Since the object of the statute, so far as it relates to procedure, is not expressly stated, it must be inferred from the title and the provisions of the act. The title declares that the object of the procedure is to enable the Attorney General to "secure testimony" in relation to violations of the act, and the text indicates the same purpose. The statute is remedial, and it is the duty of courts to so construe it as to "suppress the mischief and advance the remedy." As no notice to the proposed adverse party is required, and no opportunity is expressly afforded for cross-examination, the testimony cannot be read in evidence upon the trial of the action. The taking of testimony for use upon a trial is part of the trial itself, so far as the constitutional provision allowing the right to counsel and requiring due process of law is concerned. No judgment can be pronounced, or determination made, based wholly or in part upon such testimony, which is not reported to the judge or court for judicial action.

The only use, so far as we can now see, that can be made of the testimony, is to enable the Attorney General either to prepare his complaint or prepare for trial. The former is a judicial purpose, and is clearly within the power of the Legislature to intrust to the court or its judges. *Glenney v. Stedwell*, 64 N. Y. 120. It aids directly in framing the issues which the court is to try, tends to prevent the delay resulting from amendments of the complaint, and thus advances the remedy to the end which is to be effected by the judgment. In *re Cooper*, 22 N. Y. 67, 84. The other use suggested involves a serious question. It is urged that an inquisition into one's private affairs, the compulsory production of his books and papers and the disclosure of his business secrets, is an invasion of personal liberty as guaranteed by the Constitution. It is insisted that a proceeding which ends in nothing, that establishes no right and prevents no wrong, either directly or indirectly, is not of a judicial nature. \* \* \*

Through its legislative department the state can, examine witnesses with reference to prospective legislation, and why can it not, through its judicial department, under an appropriate statute, examine witnesses in order to establish in court rights belonging to all its citizens, even if the testimony is not to be read in court, but is to be used for a purpose incidental to the trial? \* \* \*

The procedure authorized is in the nature of a statutory bill of discovery. The ancient remedy of enforcing discovery was devised by the courts to compel a party in a pending action at law to discover and set forth upon oath in an independent action every fact and circumstance within his knowledge, information, or belief material to the plaintiff's case. 2 Story, Eq. Jur. (13th Ed.) 811; *Adams*, Eq.

(8th Ed.) 1. A bill of discovery was never brought to a hearing, and there could be no decree on matters set forth therein, for its sole object was to obtain testimony for use in another action. 6 Enc. Pl. & Prac. 781. It would lie even if the other action had not been brought, provided there was an intention to bring it. *Stebbins v. Cowles*, 10 Conn. 408. The process of thus obtaining testimony has never been regarded as an unauthorized interference with personal liberty, but as due process of law. If the courts themselves, simply of their own motion, can establish such a system, cannot the Legislature create a procedure similar in nature, even if it is more drastic in effect?

It is true that testimony thus taken could be read in evidence upon the trial of the other action, but is this essential to a judicial purpose, or does due process of law require that testimony cannot be taken by a judge, unless it is to be read in court, provided the sovereign power needs it in order to enforce its own laws through judicial proceedings? Is the state itself, when a litigant, not to establish a mere right of property, but a cause of public justice, limited by its own constitution to the procedure that ordinarily prevails in controversies between individuals, or has it the power through its legislature to authorize testimony to be taken in order to aid its attorney general in attempting to enforce its policy as a political community and to promote the general welfare by proceedings in its courts of justice? Is there no power in government to examine a witness for this purpose? The question is not whether the exercise of the power is wise or discreet, but whether the power exists. We are not called upon to decide whether the thing should be done, but whether it can be done; and care should be taken in making the decision not to hamper the state in the enforcement of law. \* \* \* 64

*Hand* We think the duties imposed by chapter 690 of the Laws of 1899 upon justices of the Supreme Court are of a judicial character, because they are incidental to a judicial proceeding; that said statute does not infringe upon personal liberty without due process of law, and does not come within the express or implied prohibition of the state or federal Constitutions. The first question certified should therefore, be answered in the negative, and the second in the affirmative. \* \* \*

The order of the Appellate Division should be reversed, and that of the Special Term affirmed, with costs, and the questions certified answered as indicated in the opinion.

BARTLETT and O'BRIEN, JJ., dissent.

<sup>64</sup> The court then refers to *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047 (1894), ante, p. 245.

See, also, as to security issues suspected of being fraudulent, *New York General Business Law*, §§ 343, 344, 354.



## FEDERAL TRADE COMMISSION v. AMERICAN TOBACCO CO.

Supreme Court of the United States, 1924. 264 U. S. 298, 44 S. Ct. 336, 68 L. Ed. 696, 32 A. L. R. 786.

In Error to the District Court of the United States for the Southern District of New York.

Petitions for mandamus by the Federal Trade Commission against the American Tobacco Company and against the P. Lorillard Company, Inc. The petitions were denied (283 F. 999), and the Trade Commission brings error. Judgments affirmed.

Mr. Justice HOLMES delivered the opinion of the Court.

These are two petitions for writs of mandamus to the respective corporations respondent, manufacturers and sellers of tobacco, brought by the Federal Trade Commission under the Act of September 26, 1914, c. 311, § 9, 38 Stat. 717, 722 (Comp. St. § 8836i), and in alleged pursuance of a resolution of the Senate passed on August 9, 1921. The purpose of the petitions is to require production of records, contracts, memoranda and correspondence for inspection and making copies. They were denied by the District Court. 283 F. 999. The resolution directs the Commission to investigate the tobacco situation as to domestic and export trade with particular reference to market price to producers, etc. The act directs the Commission to prevent the use of unfair methods of competition in commerce and provides for a complaint by the Commission, a hearing and a report, with an order to desist if it deems the use of a prohibited method proved. The Commission and the party concerned are both given a resort to the Circuit Court of Appeals. Section 5 (Comp. St. § 8836e). By section 6 (Comp. St. § 8836f) the Commission shall have power (a) to gather information concerning, and to investigate the business, conduct, practices and management of any corporation engaged in commerce, except banks and common carriers, and its relation to other corporations and individuals; (b) to require reports and answers under oath to specific questions furnishing the Commission such information as it may require on the above subjects; (d) upon the direction of the President or either House of Congress to investigate and report the facts as to alleged violation of the Anti-Trust Acts (Comp. St. § 8820 et seq.). By section 9 (Comp. St. § 8836i) for the purposes of this act the Commission shall at all reasonable times have access to, for the purposes of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against and shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. In case of disobedience an order may be obtained from a District Court. Upon application of the Attorney General the District Courts are given jurisdiction to issue writs of mandamus to require

compliance with the act or any order of the Commission made in pursuance thereof. The petitions are filed under this clause and the question is whether orders of the Commission to allow inspection and copies of the documents and correspondence referred to were authorized by the act.

The petitions allege that complaints have been filed with the Commission charging the respondents severally with unfair competition by regulating the prices at which their commodities should be resold, set forth the Senate resolution, and the resolutions of the Commission to conduct an investigation under the authority of sections 5 and 6 (a), being Comp. St. §§ 8836e, 8836f, and in pursuance of the Senate resolution, and for the further purpose of gathering and compiling information concerning the business, conduct and practices, etc., of each of the respondent companies. (There are the necessary formal allegations and a prayer that unless the accounts, books, records, documents, memoranda, contracts, papers and correspondence of the respondents are immediately submitted for inspection and examination and for the purpose of making copies thereof, a mandamus issue requiring, in the case of the American Tobacco Company, the exhibition during business hours when the Commission's agent requests it, of all letters and telegrams received by the Company from, or sent by it to all of its jobber customers, between January 1, 1921, to December 31, 1921, inclusive. In the case of the P. Lorillard Company the same requirement is made and also all letters, telegrams or reports from or to its salesmen, or from or to all tobacco jobbers' or wholesale grocers' associations, all contracts or arrangements with such associations, and correspondence and agreements with a list of corporations named.

The Senate resolution may be laid on one side as it is not based on any alleged violation of the Anti-Trust acts, within the requirement of section 6 (d) of the act. *United States v. Louisville & Nashville R. R. Co.*, 236 U. S. 318, 329, 35 S. Ct. 363, 59 L. Ed. 598. The complaints, as to which the Commission refused definite information to the respondents, and one at least of which, we understand, has been dismissed, also may be disregarded for the moment, since the Commission claims an unlimited right of access to the respondents' papers with reference to the possible existence of practices in violation of section 5.

The mere facts of carrying on a commerce not confined within State lines and of being organized as a corporation do not make men's affairs public, as those of a railroad company now may be. *Smith v. Interstate Commerce Commission*, 245 U. S. 33, 43, 38 S. Ct. 30, 62 L. Ed. 135. Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 479, 14 S. Ct. 1125, 38 L. Ed. 1047), and to direct fishing expedi-

tions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this Court to sustain such a claim is shown in *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 29 S. Ct. 115, 53 L. Ed. 253, and as to correspondence, even in the case of a common carrier, in *United States v. Louisville & Nashville R. R. Co.*, 236 U. S. 318, 335, 35 S. Ct. 363, 59 L. Ed. 598. The question is a different one where the State granting the charter gives its Commission power to inspect.

The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer. *Wigram, Discovery* (2d Ed.) § 293. We assume that the rule to be applied here is more liberal but still a ground must be laid and the ground and the demand must be reasonable. *Essgee Co. v. United States*, 262 U. S. 151, 156, 157, 43 S. Ct. 514, 67 L. Ed. 917. A general subpoena in the form of these petitions would be bad. Some evidence of the materiality of the papers demanded must be produced. *Hale v. Henkel*, 201 U. S. 43, 77, 26 S. Ct. 370, 50 L. Ed. 652. In the state case relied on by the Government, the requirement was only to produce books and papers that were relevant to the inquiry. *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 S. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658. The form of the subpoena was not the question in *Wheeler v. United States*, 226 U. S. 478, 488, 33 S. Ct. 158, 57 L. Ed. 309.

The demand was not only general but extended to the records and correspondence concerning business done wholly within the State. This is made a distinct ground of objection. We assume for present purposes that even some part of the presumably large mass of papers relating only to intrastate business may be so connected with charges of unfair competition in interstate matters as to be relevant, *Stafford v. Wallace*, 258 U. S. 495, 520, 521, 42 S. Ct. 397, 66 L. Ed. 735, 23 A. L. R. 229, but that possibility does not warrant a demand for the whole. For all that appears the corporations would have been willing to produce such papers as they conceived to be relevant to the matter in hand. See *Terminal Taxicab Co. v. District of Columbia*, 241 U. S. 252, 256, 36 S. Ct. 583, 60 L. Ed. 984, Ann. Cas. 1916D, 765. If their



judgment upon that matter was not final, at least some evidence must be offered to show that it was wrong. No such evidence is shown.

We have considered this case on the general claim of authority put forward by the Commission. The argument for the Government attaches some force to the investigations and proceedings upon which the Commission had entered. The investigations and complaints seem to have been only on hearsay or suspicion—but even if they were induced by substantial evidence under oath the rudimentary principles of justice that we have laid down would apply. We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408, 29 S. Ct. 527, 53 L. Ed. 836. *United States v. Jin Fuey Moy*, 241 U. S. 394, 401, 36 S. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854.

Judgments affirmed.

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EXECUTIVE LAW OF NEW YORK (Consol. Laws, c. 18) § 62,  
subd. 8, as added by Laws 1917, c. 595.

8. Whenever in his judgment the public interest requires it, the Attorney General may, with the approval of the Governor, and when directed by the Governor, shall, inquire into matters concerning the public peace, public safety and public justice. For such purpose he may, in his discretion, and without civil service examination, appoint and employ, and at pleasure remove, such deputies, officers and other persons as he deems necessary, determine their duties and, with the approval of the Governor, fix their compensation. All appointments made pursuant to this subdivision shall be immediately reported to the Governor, and shall not be reported to any other state officer or department. Payments of salaries and compensation of officers and employees and of the expenses of the inquiry shall be made out of funds provided by the Legislature for such purposes, which shall be deposited in a bank or trust company in the names of the Governor and the Attorney General, payable only on the draft or check of the Attorney General, countersigned by the Governor, and such disbursements shall be subject to no audit except by the Governor and the Attorney General. The Attorney General, his deputy, or other officer designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate and require the production of any books or papers which he deems relevant or material to the inquiry. If a person subpoenaed to attend upon such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, when ordered so to do by the officer conducting such inquiry, he shall be guilty of a misdemeanor. It shall be

the duty of all public officers, their deputies, assistants and subordinates, clerks and employees, and all other persons, to render and furnish to the Attorney General, his deputy or other designated officer, when requested, all information and assistance in their possession and within their power. Each deputy or other officer appointed or designated to conduct such inquiry shall make a weekly report in detail to the Attorney General, in form to be approved by the Governor and the Attorney General, which report shall be in duplicate, one copy of which shall be forthwith, upon its receipt by the Attorney General, transmitted by him to the Governor. Any officer participating in such inquiry and any person examined as a witness upon such inquiry who shall disclose to any person other than the Governor or the Attorney General the name of any witness examined or any information obtained upon such inquiry, except as directed by the Governor or the Attorney General, shall be guilty of a misdemeanor.

## CHAPTER 4

### SUMMARY ACTION

#### PRELIMINARY NOTE.

As to distress warrants against delinquent collecting officers, see *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 18 How. 272, 15 L. Ed. 372 (1855); *Weimer v. Bunbury*, 30 Mich. 201 (1874), under *Comp. Laws Mich.* 1871, § 1029 (the provision is not to be found in the revision of the tax law of 1885, No. 153).

Laws Ill. 1855, Auditor's Report to the General Assembly: "The constitutionality of so much of the revenue law as authorizes the auditor to issue stress warrants, with orders to sell the property, of delinquent collectors, etc., has been questioned, and as it has but little, if any, advantage over the regular mode of proceeding in the courts against such collectors, I respectfully suggest its repeal." The provision was omitted from the revenue law of 1872.

Distress warrant for the collection of taxes, see *Cooley, Taxation* (4th Ed.) §§ 1344, 1345.

Administrative imposition of penalties for fraudulent evasion of taxes, see *Doll v. Evans*, Fed. Cas. No. 3969 (1872); *People v. Nat. Bank, etc.*, 123 Cal. 53, 55 P. 685, 45 L. R. A. 747, 69 Am. St. Rep. 32 (1898); *Boyer v. Jones*, 14 Ind. 354 (1860); *McCormick v. Fitch*, 14 Minn. 252, Gil. 185 (1869).

Tariff Bill 1846, § 9, provided that in all cases in which the appraisers should suspect that goods were fraudulently undervalued the government might seize the goods, and sell them at public auction, and after paying the consignee the declared value with 5 per cent. in addition, cover the balance into the treasury. This passed the House, but, being denounced as unconstitutional, was, on motion of Webster, struck out by the Senate. Stanwood, *American Tariff Controversies*, II, 79.

Administrative imposition of penalties on shipping companies under immigration laws. *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 320, 29 S. Ct. 671, 53 L. Ed. 1013.

As to summary action against persons, see *Haverty v. Bass*, 66 Me. 71 (1876), quarantine; *Lovell v. Seebach*, 45 Minn. 465, 48 N. W. 23, 11 L. R. A. 667 (1891), removal of paupers; also 19 *Opinions Attys. Gen.* 706 (1890).

Collection of taxes by seizure of person, see *Palmer v. McMahon*, 133 U. S. 660, 10 Sup. Ct. 324, 33 L. Ed. 772 (1890).

Summary action under the President's power to take care that the laws be faithfully executed. *Cunningham v. Neagle*, 135 U. S. 1, 10 S. Ct. 658, 34 L. Ed. 55 (1890), President deputing a United States marshal to protect the person of a federal judge while engaged in the performance of his duties.

As to forfeiture by administrative process, see *Wilcox v. Flemming*, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625 (1883); *Lawton v. Steele*, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385 (1894).



## SECTION 16.—ABATEMENT OF NUISANCES—RECOGNITION AND VALIDITY OF POWER

### NEFF v. PADDOCK et al.

Supreme Court of Wisconsin, 1870. 26 Wis. 546.

Trespass quare clausum for the removal of plaintiff's fence. Defense, that the locus was part of a well-known and long-traveled highway, upon which plaintiff had willfully built his fence, and that defendants removed it by direction of the town board of supervisors, doing no unnecessary damage.

COLE, J. \* \* \* The court in effect instructed the jury that if they found that the fence erected by the plaintiff in the highway extended more than six feet from the East line of the road into the same, so as to endanger or inconvenience travel thereon, then it was the duty of the supervisors to cause the fence to be removed, doing no unnecessary damage, and that such action on their part was lawful. The plaintiff removed his fence into the middle of the highway, and by so doing committed a nuisance. It was the duty of the supervisors to cause the fence to be removed summarily. The public have the right to an uninterrupted passage along the highway for themselves and carriages; and it is the clear legal duty of the supervisors to cause all obstructions to be removed which seriously interfere with or impede the exercise of this right. It would be a most serious defect in the law if in the case of a palpable obstruction of a highway, which interrupts its use and discommodes and endangers the safety of travelers, the public authorities had not the right to remove it without delay. We do not think that such is the law in this state. *Lemon v. Haydon*, 13 Wis. 159; *Wyman v. State*, Id. 663; *Wetmore v. Tracy*, 14 Wend. (N. Y.) 250, 28 Am. Dec. 525. \* \* \*<sup>1</sup>

<sup>1</sup> *Wetmore v. Tracy*, 14 Wend. (N. Y.) 250, 28 Am. Dec. 525 (1835), was a case of abatement by private individuals. The doctrine of the earlier New York cases (*Hart v. Mayor of Albany*, 9 Wend. [N. Y.] 589, 24 Am. Dec. 165 [1832]; *Meeker v. Van Rensselaer*, 15 Wend. [N. Y.] 397 [1836]), that any individual may abate a public nuisance, is changed by *Ft. Plain Bridge Co. v. Smith*, 30 N. Y. 44, 62 (1864), which holds that no one has the right to abate a public nuisance, unless he has himself sustained some damages not sustained by the rest of the community.

Blackstone, bk. 3, c. 1, says: "If a new gate be erected across the public highway, which is a common nuisance, any of the King's subjects passing that way may cut it down and destroy it," and "such nuisance may be abated—that is, taken away or removed—by the party aggrieved thereby, so as he commits no riot in the doing of it."

So especially there is no common-law right of summary abatement by individuals, where the nuisance consists only in the violation of the law, as, e. g., the illegal sale of liquor, see *Brown v. Perkins*, 12 Gray (Mass.) 89

## HUBBELL v. GOODRICH et al.

Supreme Court of Wisconsin, 1875. 37 Wis. 84.

Appeal from the circuit court for Sauk county.

This action is to recover damages for an alleged trespass by the defendants in entering upon the lands of the plaintiff and taking down and removing a fence. The answer avers that the locus in quo is a public highway; that the defendant Goodrich, who was then overseer of highway in the road district in which such lands are situated, entered upon the plaintiff's said land, and, with the assistance of the other defendant, removed such fence out of the highway, doing no unnecessary damage; and that he removed the fence by order of the supervisors of the proper town.

The testimony given on the trial of the action tends to prove these averments of the answer, and also tends to prove that the fence was an obstruction to travel on the alleged highway.

The jury found for the defendant, a motion for a new trial was denied, and judgment against the plaintiff for costs was duly entered. The plaintiff appealed from such judgment.

LYON, J. 1. The supervisors are charged by law with the care of the highways in their respective towns, and it is their duty to give directions for repairing the same, and from time to time to require overseers of highways therein to perform their duties. Rev. St. c. 19, § 1 (Tayl. St. p. 477, § 1). The supervisors have power, and it is their duty, to cause the summary removal of any public nuisance found in any highway under their jurisdiction. *Neff v. Paddock*, 26 Wis. 546. And to this end they may require the overseer in whose district it is located so to remove the same.

Any obstruction in or encroachment upon a highway, which unnecessarily impedes or incommodes the lawful use of such highway by the public, is a public nuisance, and may be summarily abated. *Angell on Highways*, 223, 274.

2. The supervisors also have the power, as we think, to cause the summary removal of any structure unlawfully and willfully placed within the limits of a highway by any person, although the same is not a public nuisance. As to the signification of the word "willfully," as here used, see *State v. Preston*, 34 Wis. 675.

(1858); *Earp v. Lee*, 71 Ill. 192 (1873); *Gray v. Ayres*, 7 Dana (Ky.) 375, 32 Am. Dec. 107 (1838).

Where the right of any individual to abate a nuisance is recognized, it may be exercised, a fortiori, by an officer. *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830 (1885).

But such abatement must be unaccompanied by a breach of the peace. *Rex v. Rosewell*, 2 Salk. 459 (1699); *Day v. Day*, 4 Md. 262 (1853).

See F. J. Goodnow, Summary Abatement of Nuisances, *Columbia Law Review*, II, 203; *Cyclopedia of American Government*, article "Nuisances."

3. But where the obstruction or encroachment is not a public nuisance, and was not willfully placed in the highway (as where it was placed there by inadvertence or carelessness, without any intention to obstruct the highway), we are of the opinion that the supervisors have no power to cause the summary removal thereof. The remedy given by the statute must be resorted to in such a case. Rev. St. c. 19, §§ 102 to 108 (Tayl. St. p. 508, §§ 138 to 144); Wyman v. State, 13 Wis. 663.

The learned circuit judge instructed the jury that the defendants were not liable for removing such portion of the fence as was in a public highway, and that if all of the fence removed by them was within the highway the defendants were entitled to a verdict. This instruction is not qualified in any manner, and it entirely ignores the principle last above stated. Under it the action might be defeated even though the fence was not a public nuisance, and was not willfully placed there by the plaintiff; in which case, as we have seen, the town authorities had no power to remove it summarily. We do not know but the verdict was predicated upon precisely such a state of facts; for the testimony does not conclusively prove either that the fence was a public nuisance, or that it was willfully placed there by the plaintiff.

It was error, therefore, to give the above instruction; and because the error may have injured the plaintiff, there must be another trial.

Judgment reversed, and new trial awarded.<sup>2</sup>

<sup>2</sup> The English authorities are silent as to the power of officers, such as surveyors of highways, etc., to remove or abate nuisances, apart from statute, without judicial order or conviction. See Shaw's Parish Law, 1750.

A sheriff or constable seems to have no such power, by virtue of his office, by the common law.

The statutes were slow in granting such power. See 13 Geo. III, c. 78, § 12 (only after 20 days' notice), and 5 & 6 William IV, c. 50, §§ 69, 73. See 2 Ell. & Bl. 748; also 57 Geo. III, c. 29 (Michel Angelo Taylor's Act, relating to London, a private act) §§ 65, 67, only after judgment for penalty.

For American legislation, see the following:

Prov. Laws Mass. 1693-94, c. 6 (Highways):

"Section 1. \* \* \* The surveyors are hereby empowered to cut down, dig up, and remove, as well all sorts of trees, bushes, stones, fences, rails, gates, inclosures, or other thing or things, as may any ways straighten, hurt, hinder, or incommode the highways."

"Sec. 5. If any person \* \* \* shall erect or set up any gate, rails, or fence upon or across any highway or country road, or continue any such road to the annoyance and incumbrance of the same (other than such as shall be allowed by the court of quarter sessions within the county), it shall be deemed a common nuisance, and it shall be lawful for any person or persons to pull down and remove the same."

1 Rev. St. N. Y. 1829, p. 521:

"Sec. 103. In every case where a highway shall have been laid out, and the same has been or shall be encroached upon by fences, \* \* \* the commissioners of highways \* \* \* shall, if in their opinion it be deemed necessary, order such fences to be removed, so that such highway may be of the breadth originally intended. The commissioners making the order shall cause the same to be reduced to writing and signed. They shall also give notice

*Reversed.  
2nd trial*



## KING v. DAVENPORT, Executor.

Supreme Court of Illinois, 1881. 98 Ill. 305, 38 Am. Rep. 89.

Mr. Justice SHELDON delivered the opinion of the Court.

The city of Jacksonville, in this state, having power, by ordinance, to establish fire limits and to declare the building or repairing of buildings with combustible materials within the fire limits a nuisance, its city council did, by ordinance, establish fire limits, and enacted (that any building built or repaired with other than fire-proof material, or any roof or gutter placed on any building, the outer surface of which was made with materials other than fire-proof, if within the fire limits, and done without permission, should be deemed a nuisance, and that if the offender, upon reasonable notice, failed to remove such wooden building, or wooden part of such building, the city marshal, upon the written direction of the mayor, should "remove or tear down such building, or such part thereof as may be necessary." The ordinance further provided, that the offender should be subject to a fine of \$100 for each week he failed to remove such wooden building, or wooden part thereof, and that if the city caused the removal, the expense of the removal might be recovered of the offender. The plaintiff's testatrix violated this ordinance by taking off an old and out of repair shingle roof from her building, situated within the fire limits, and putting thereon, without permission, a new shingle roof. She failing to remove the same upon due notice, the roof was removed by the city marshal, in conformity with the ordinance.

She brought this suit of trespass against the mayor and marshal of the city for the removing of the roof, and dying since the bringing of the suit, her executor was substituted as plaintiff. The defendants justified under the ordinance, and on trial by the court, without a jury, judgment was rendered against them for \$175, which, on appeal to the Appellate Court for the Third District, was affirmed,

in writing to the occupant of the land, to remove such fences within sixty days. Every such order and notice shall specify the breadth of the road originally intended, the extent of the encroachment, and the place or places in which the same shall be.

"Sec. 104. If such removal shall not be made within sixty days after the service of such notice, the occupant to whom the notice shall be given shall forfeit the sum of fifty cents for every day, after the expiration of that time for which such fences shall continue unremoved."

In *Wetmore v. Tracy*, 14 Wend. 250, 28 Am. Dec. 525 (1835), this was held not to supersede the common-law remedy by abatement.

The following words were added to this section by chapter 300 of Laws of 1840:

"And the commissioners of highways may remove or cause to be removed such encroachment, and the occupant of the premises shall pay to the commissioners of highways all reasonable charges therefor."

Chicago Municipal Code, § 3215:

"The commissioner of public works may direct the removal of any article or thing whatsoever, which may encumber or obstruct any street, avenue or alley in the city."

and then the present appeal taken, the proper certificate having been made to authorize it.

The sole question here presented is upon the validity of the ordinance.

By its charter the following legislative power is delegated to the city of Jacksonville:

"The city council, for the purposes of guarding against the calamities of fire, shall have power to prohibit the erection, placing or repairing of wooden buildings within the limits prescribed by them, without their permission, and direct and prescribe that all buildings within the limits prescribed shall be made or constructed of fire-proof materials, and to prohibit the rebuilding of wooden buildings; to declare all dilapidated buildings to be a nuisance, and to direct the same to be removed, repaired or abated, in such manner as they shall prescribe and direct; to declare all wooden buildings which they may deem dangerous to contiguous buildings, or in causing or promoting fires, to be nuisances, and to require and cause the same to be removed or abated in such manner as they shall prescribe.

"And, generally, to establish such regulations for the prevention and extinguishment of fires as the city council may deem expedient.

"The city council shall have power to pass, publish, and repeal all ordinances, rules and police regulations, not contrary to the Constitution and laws of the United States and of this state, \* \* \* or proper to carry into effect the powers vested by this act in the corporation; to determine what shall be a nuisance and provide for the punishment, removal and abatement of the same; and also to punish violations of its ordinances by fines, penalties and imprisonment," etc.

"To define and declare what shall be nuisances, and authorize and direct the summary abatement thereof."

There is here given ample authority, we think, for the passage of the ordinance in question.

The inquiry then must be, whether the enactment of such a law is within the competency of legislative power. Unwholesome trades, slaughterhouses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all, says Chancellor Kent, be interdicted by law in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community. 2 Kent, Com. 340. The right to restrain owners of land in towns from erecting wooden buildings, except under certain restrictions, has never been doubted, or, if it has been, the doubt has long since been removed. Commonwealth v. Tewksbury, 11 Metc. (Mass.) 58. Such regulation is but "a just restraint of an injurious use of property, which the Legislature have authority to make." Id. 59. But the particular respect in which the ordinance

is assailed is that it authorizes the abatement of the nuisance summarily, without any prior adjudication of the right to exercise the power.

The summary abatement of nuisances is a remedy which has ever existed in the law, and its exercise is not regarded as in conflict with constitutional provisions for the protection of the rights of private property) Blackstone, in his classification of remedies by the act of a party, says: "The fourth species of remedy by the mere act of the party injured is the abatement or removal of nuisance" (3 Black. Com. 5), and that "the reason why the law allows this private and summary method of doing one's self justice is because injuries of this kind, which obstruct or annoy such things as are of daily convenience for use, require an immediate remedy, and cannot wait the slow progress of the ordinary forms of justice." \* \* \*

There can be no doubt, it seems to us, that the ordinance in question was a police regulation, proper, and made in good faith, "for the purpose of guarding against the calamities of fire," in a populous neighborhood; and we must regard it as an entirely reasonable regulation. There is no more frequent or admittedly proper exercise of the police power than that of the prohibition of the erection of buildings of combustible materials in the populous part of a town, and the only means of making such prohibition effectual is by summary abatement. Every moment's delay in the removal of the nuisance is constant exposure to danger. Before any judicial inquiry and hearing could be had in the matter, the whole evil sought to be guarded against might be produced.

The imposition of a penalty would but punish the offender; it would not remove the source of danger. This latter is the thing which the necessity of the case requires, and immediate abatement is the only competent remedy. It is admitted by appellee's counsel, an admission they are compelled to make under the law, that if the erection were a nuisance at common law the city authorities might abate it. But what is a nuisance at common law? Blackstone's definition is, whatever unlawfully annoys or doth damage to another is a nuisance. The construction of this wooden roof was an unlawful thing, made so by ordinance prohibiting its construction. That it was, in its nature, injurious, and a source of constant danger in a populous place, experience and the general prevalence of this sort of legislation we are considering teach us. Such was the view of the Legislature in the matter, that by the charter of this city, for the purpose of guarding against the calamities of fire, they authorized the city council to prohibit the erection or repairing of wooden buildings within the fire limits they might prescribe, and to declare such buildings to be nuisances, and cause the same to be abated as they should direct.

In pursuance of such authority, the city council established fire limits, and by ordinance declared any such roof as the one in ques-



tion, which should be put upon a building within such limits, to be a nuisance, and required the city marshal, under an order from the mayor, to remove the same.

Such an ordinance, enacted in pursuance of legislative authority, has the force of a statute, and may be viewed as though such, in the treatment of the present subject. We have here, then, what is a nuisance in fact, that which is declared to be such by ordinance—determined by law to be a nuisance—and why may not the remedy by abatement, under the ordinance, belong to it as well as in the case of any nuisance at the common law? The reason for it is equally strong. As before said, there is no other competent remedy to meet the necessity of the case.

Further, the charter authorizes the provision for summary abatement, and the ordinance consequently gives it. How is a nuisance to be abated by the city except by a summary proceeding? The term itself imports such a proceeding. This case is quite different from *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984, cited by appellee's counsel, where the court held that the mere declaration of the city council could not make an existing structure a nuisance unless it had in fact that character, and that it was not allowable "that a municipal corporation, without any general laws, either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself." The thing here, we regard, had the character of a nuisance. It was constructed in the face of a general ordinance of the city, long before passed, prohibiting any such structure, and declaring it to be a nuisance and subject to be abated as such. It was a reasonable regulation for the future, and plaintiff's defiant disobedience of it leaves her no reason for complaint of the declared consequences. \* \* \*

The judgment of the Appellate Court is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Judgment reversed.

WALKER, J. I am unable to concur in either the reasoning or conclusion announced in this opinion.

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BALDWIN et al. v. SMITH. ✓

Supreme Court of Illinois, 1876. 82 Ill. 162.

Mr. Justice BREESE delivered the opinion of the court.

This was trespass with force and arms, brought to the White circuit court by Michael Smith, plaintiff, and against the town of Grayville and William F. Baldwin, the president, and Benjamin Batson and others, members of the town council, and Isaac H. Hamilton, constable of the town of Grayville, defendants.

The defendants pleaded the general issue, and several special pleas, to which latter demurrers were sustained, and the cause tried upon the general issue. The jury found for the plaintiff, assessing his damages at \$220, whereupon a motion for a new trial was made by the defendants. Thereupon the plaintiff remitted \$70, and judgment was rendered for \$150, to reverse which the defendants, except W. Wirt Gray and Henry Butler, appeal, and assign various errors.

It is unnecessary to consider all the errors assigned, or go into a critical examination of the special pleas adjudged bad, as the whole controversy is confined within a narrow compass.

It appears the plaintiff had been duly licensed, by the proper authorities of the town of Grayville, to retail spirituous liquors—in other words, to keep a dramshop—for which he had paid \$200 into the town treasury, and had “complied with the laws and ordinances.”

There is no condition in the license, and no reference to any ordinance of the town, authorizing its revocation for cause, yet it must be held to have been granted subject to such ordinances of the town as had a legal existence at the time the same was granted, and such as were within the competency of the town authorities to enact.

An ordinance of the town, entitled “License, Groceries,” is set up in one or more of the special pleas, on three sections of which, namely, sections 2, 3 and 4, the defense is based.

Section 2 provides for the execution of a bond by the applicant for a license, conditioned that he will keep an orderly house, and observe the conditions contained in section 3, which provides that license should be granted only on the express condition that the applicant should keep an orderly house, permit no gaming or playing with cards, and should not sell, give, or otherwise dispose of to any minor under sixteen years of age, liquor of any kind. And by section 4, on which section the controversy turns, it is provided that the town council, being satisfied, upon complaint or otherwise, that the third section, or any clause thereof, has been violated, shall, in addition to the forfeiture and collection of the bond, revoke the license of such offender or offenders; and it shall be the duty of the town constable to immediately close up the grocery of such offender or offenders.

The town council, it would appear, having become satisfied, “by complaint or otherwise,” that the third section of the ordinance, or some part thereof, had been violated by the licensee, entered into an investigation of the matter, having the plaintiff before them, who was examined as a witness, and they found him guilty, revoked his license, and ordered the town constable to close the saloon, which he did by turning out the clerk then in possession, locking the doors and taking the key, thus assuming control over the premises.

Now, the only question is, had the town council, under this section of the ordinance, the power to do the acts, by and through the town constable, they admit, by their pleas, they did do?

We are satisfied they had no such power. Admitting they could

revoke the license, and did revoke it, there their power ended. They had no right, manu forti, to oust the owner from the premises, and thus deprive him of the use and control of his property, nor was there any necessity for so acting. The revocation of the license was, virtually, closing the doors of the saloon as to the traffic in liquors. Should the keeper of the saloon, after the revocation, continue to sell liquor as under the license, he would be subject to indictment and punishment under the law.

The town council had no more power to authorize the town constable to do the acts which he admits he did do than to authorize him to imprison the supposed offender, at his discretion. The investigation by the town council amounts to nothing, as that was not a judicial tribunal, empowered to make such investigations, and condemn and punish. Such proceedings as we find in this record are violative of the elementary principles of our Constitution and laws, which give to any man the right of trial by a jury, and in a court of competent jurisdiction. His guilt cannot be inquired into by a town council, and their decree enforced by a town constable, with impunity. The party charged with a violation of the ordinance had a right to be heard in court, and to receive its judgment.

The defense being based on this section of the ordinance, and that being invalid, the demurrers to the pleas setting that up as a defense were properly sustained.

This opinion proceeds upon the ground that the charter of the town of Grayville conferred authority to pass the ordinance in question. The charter is not before us for examination; but, admitting the power, so much of it as empowered the authorities to close the saloon by force must be held invalid, for the reasons given. Authority to revoke a license to sell liquor does, on being executed, to all intents and purposes close the saloon as to that traffic, but confers no authority to deprive a man, summarily, of his property or of its use. *Holding*

We are satisfied no defense to this action was set up in any of the special pleas interposed by any of these parties. The saloon should be adjudged a nuisance, before it could be abated. There must first be legal proceedings. *Earp v. Lee et al.*, 71 Ill. 193. \* \* \*

Finding no error in the record, the judgment is affirmed.

Judgment affirmed.<sup>3</sup>

<sup>3</sup> See, also, *Eddy v. Board of Health*, 10 Phila. (Pa.) 94 (1873).

As to summary abatement, destruction, etc., under the police power, see, further, *Raymond v. Fish*, 51 Conn. 80, 50 Am. Rep. 3, post, p. 366, *Deems v. Baltimore*, 80 Md. 164, 30 Atl. 648, 26 L. R. A. 541, 45 Am. St. Rep. 339 (1894); *North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 29 Sup. Ct. 101, 53 L. Ed. 195 (1908), post, p. 276.



## SECTION 17.—SAME—NOTICE BEFORE ABATEMENT

## COOPER v. BOARD OF WORKS FOR WANDSWORTH DISTRICT.

Court of Common Pleas, 1863. 14 C. B. [N. S.] 180.

This was an action for pulling down a house of the plaintiff which was in the course of erection.

The defendants justified their act under the seventy-sixth section of the Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120, which enacts that, "before beginning to lay or dig out the foundation of any new house or building within any such parish or district, or to rebuild any house or building therein, and also before making any drain for the purpose of draining directly or indirectly into any sewer under the jurisdiction of the vestry or board of or for any such parish or district, seven days' notice in writing shall be given to the vestry or board by the person intending to build or rebuild such house or building or to make such drain; \* \* \* and the vestry or district board shall make their order in relation to the matters aforesaid, and cause the same to be notified to the person from whom such notice was received, within seven days after the receipt of such notice; and, in default of such notice, or if such house, building, or drain, or branches thereto, or other connected works and apparatus and water supply, be begun, erected, made, or provided in any respect contrary to any order of the vestry or board made and notified as aforesaid, or the provisions of this act, it shall be lawful for the vestry or board to cause such house or building to be demolished or altered, and to cause such drain or branches thereto, and other connected works and apparatus, and water supply, to be re-laid, amended, or re-made, or, in the event of omission, added, as the case may require, and to recover the expenses thereof from the owner thereof in the manner hereinafter provided."

The cause was tried before Willes, J., at the sittings in Middlesex after last Michaelmas term. It appeared that the plaintiff, a builder, was employed to build a house within the Wandsworth district, and had already reached the second story, when the defendants, without giving him any notice, sent their surveyor and a number of workmen, at a late hour in the evening, and razed it to the ground.

There was conflicting evidence as to whether or not the plaintiff had given the notice, required by the seventy-sixth section of the Metropolis Local Management Act, of his intention to build; he alleging that he had, and the officers of the board denying that any such notice had come to their hands. But it was admitted by the

plaintiff that he had commenced digging out the foundations within five days of the day on which he alleged he had sent notice.

On the part of the plaintiff, it was submitted that the district board of works had no power under the circumstances to demolish his house, and that, assuming they had such power, they had improperly exercised it, by acting without notice to him or giving him an opportunity of being heard.

For the defendants it was insisted that the seventy-sixth section of the statute gave them a discretion, against the exercise of which there was no appeal, except to the metropolitan board of works under section 211, and that, inasmuch as they were acting ministerially, and not judicially, they were not bound to give any notice.

Under the direction of the learned judge, a verdict was entered for the plaintiff, leave being reserved to the defendants to move to enter the verdict for them, or a nonsuit, if the court should be of opinion that the action was not maintainable.

ERLE, C. J. I am of opinion that this rule ought to be discharged. This was an action of trespass by the plaintiff against the Wandsworth district board, for pulling down and demolishing his house; and the ground of defense that has been put forward by the defendants has been under the seventy-sixth section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120. By the part of that section which applies to this case, it is enacted that, before any person shall begin to build a new house, he shall give seven days' notice to the district board of his intention to build; and it provides at the end that in default of such notice it shall be lawful for the district board to demolish the house. The district board here say that no notice was given by the plaintiff of his intention to build the house in question, wherefore they demolished it. The contention on the part of the plaintiff has been that, although the words of the statute, taken in their literal sense, without any qualification at all, would create a justification for the act which the district board has done, the powers granted by that statute are subject to a qualification which has been repeatedly recognized, that no man is to be deprived of his property without his having an opportunity of being heard. The evidence here shows that the plaintiff and the district board had not been quite on amicable terms. Be that as it may, the district board say that no notice was given, and that consequently they had a right to proceed to demolish the house without delay, and without notice to the party whose house was to be pulled down, and without giving him an opportunity of shewing any reason why the board should delay.

I think that the power which is granted by the seventy-sixth section is subject to the qualification suggested. It is a power carrying with it enormous consequences. The house in question was built only to a certain extent. But the power claimed would apply to a complete house. It would apply to a house of any value, and completed to any extent; and it seems to me to be a power which may be exercised most perniciously, and that the limitation which we are going to put upon

it is one which ought, according to the decided cases, to be put upon it, and one which is required by a due consideration for the public interest. I think the board ought to have given notice to the plaintiff, and to have allowed him to be heard. The default in sending notice to the board of the intention to build is a default which may be explained. There may be a great many excuses for the apparent default. The party may have intended to conform to the law. He may have actually conformed to all the regulations which they would wish to impose, though by accident his notice may have miscarried; and, under those circumstances, if he explained how it stood, the proceeding to demolish, merely because they had ill will against the party, is a power that the Legislature never intended to confer. I cannot conceive any harm that could happen to the district board from hearing the party before they subjected him to a loss so serious as the demolition of his house; but I can conceive a great many advantages which might arise in the way of public order, in the way of doing substantial justice, and in the way of fulfilling the purposes of the statute, by the restriction which we put upon them, that they should hear the party before they inflict upon him such a heavy loss.

I fully agree that the Legislature intended to give the district board very large powers indeed; but the qualification I speak of is one which has been recognized to the full extent. It has been said that the principle that no man shall be deprived of his property without an opportunity of being heard is limited to a judicial proceeding, and that a district board ordering a house to be pulled down cannot be said to be doing a judicial act. I do not quite agree with that; neither do I undertake to rest my judgment solely upon the ground that the district board is a court exercising judicial discretion upon the point; but the law, I think, has been applied to many exercises of power which in common understanding would not be at all more a judicial proceeding than would be the act of the district board in ordering a house to be pulled down. The case of the corporation of the University of Cambridge, who turned out Dr. Bentley, in the exercise of their assumed power of depriving a member of the University of his rights, and a number of other cases which are collected in the Hammersmith Rent-Charge Case, 4 Exch. 96, in the judgment of Parke, B., show that the principle has been very widely applied. The district board must do the thing legally; there must be a resolution; and, if there be a board, and a resolution of that board, I have not heard a word to show that it would not be salutary that they should hear the man who is to suffer from their judgment before they proceed to make the order under which they attempt to justify their act.

It is said that an appeal from the district board to the metropolitan board (under section 211) would be the mode of redress. But, if the district board have the power to do what is here stated, I am not at all clear that there would be a right of redress in that way. The metropolitan board may not have a right to give redress for that which was done under the provisions of the statute. I think the appeal clause



would evidently indicate that many exercises of the power of a district board would be in the nature of judicial proceedings, because, certainly when they are appealed from, the appellant and the respondent are to be heard as parties, and the matter is to be decided at least according to judicial forms. I take that to be a principle of very wide application, and applicable to the present case; (and I think this board was not justified under the statute, because they have not qualified themselves for the exercise of their power by hearing the party to be affected by their decision.)

WILLES, J. I am of the same opinion. \* \* \* There is another remark to be made with reference to these parties' proceedings. The board are not only to do the work of demolishing the house, if they think proper, or modifying it, but they are to charge the expenses on the person who has erred against the act. His property is affected and his purse is further affected. What happens upon that? and how is the money to be got? That is a proceeding under the 225th section, which is a section giving jurisdiction to the justices before whom the costs are to be ascertained and recovered; and it is clear that under that section the justices could not proceed without having before them the person against whom the expenses are to be adjudged. And it does seem an absurdity to say that in determining the amount of expenses the party shall be heard, but that in determining whether proceedings should be taken his mouth should be closed. I cannot help thinking that a board exercising this large power should follow the ordinary rule, that the party sought to be affected should be heard; and I think that the verdict for the plaintiff ought to stand.

BYLES, J. I am of the same opinion. This is a case in which the Wandsworth district board have taken upon themselves to pull down a house, and to saddle the owner with the expenses of demolition, without notice of any sort. There are two sorts of notice which may possibly be required, and neither of them has been given—one, a notice of a hearing, that the party may be heard if he has anything to say against the demolition; the other is a notice of the order, that he may consider whether he can mitigate the wrath of the board, or in any way modify the execution of the order. Here they have given him neither opportunity. It seems to me that that board are wrong, whether they acted judicially or ministerially. I conceive they acted judicially, because they had to determine the offense, and they had to apportion the punishment as well as the remedy. This being so, a long course of decisions, beginning with Dr. Bentley's Case, Rex v. Chancellor, etc., of Cambridge, 1 St. 557, 2 Ld. Raym. 1334, 8 Mod. 148, Fortescue, 202, and ending with some very recent cases, establish that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature. \* \* \*

Rule discharged.<sup>4</sup>

<sup>4</sup> Approved by Court of Appeal, Hopkins v. Smethwick Local Board of Health, 24 Q. B. D. 712 (1890).

## NORTH AMERICAN COLD STORAGE CO. v. CITY OF CHICAGO.

Supreme Court of United States, 1908. 211 U. S. 306, 29 Sup. Ct. 101, 53 L. Ed. 195.

The case involved the question of the validity of section 1161 of the Revised Municipal Code of the City of Chicago for 1905, which reads as follows:

"Every person being the owner, lessee, or occupant of any room, stall, freight house, cold storage house, or other place, other than a private dwelling, where any meat, fish, poultry, game, vegetables, fruit, or other perishable article adapted or designed to be used for human food shall be stored or kept, whether temporarily or otherwise, and every person having charge of, or being interested or engaged, whether as principal or agent, in the care of or in respect to the custody or sale of any such article of food supply, shall put, preserve, and keep such article of food supply in a clean and wholesome condition, and shall not allow the same, nor any part thereof, to become putrid, decayed, poisoned, infected, or in any other manner rendered or made unsafe or unwholesome for human food; and it shall be the duty of the meat and food inspectors and other duly authorized employes of the health department of the city to enter any and all such premises above specified at any time of any day, and to forthwith seize, condemn, and destroy any such putrid, decayed, poisoned, and infected food, which any such inspector may find in and upon said premises." \* \* \*

PECKHAM, J. \* \* \* Complainant, however, contends that there was no emergency requiring speedy action for the destruction of the poultry in order to protect the public health from danger resulting from consumption of such poultry. It is said that the food was in cold storage, and that it would continue in the same condition it then was for three months, if properly stored, and that therefore the defendants had ample time in which to give notice to complainant or the owner and have a hearing of the question as to the condition of the poultry; and, as the ordinance provided for no hearing, it was void. But we think this is not required. The power of the Legislature to enact laws in relation to the public health being conceded, as it must be, it is to a great extent within legislative discretion as to whether any hearing need be given before the destruction of unwholesome food which is unfit for human consumption. If a hearing were to be always necessary, even under the circumstances of this case, the question at once arises as to what is to be done with the food in the meantime. Is it to remain with the cold storage company, and, if so, under what security that it will not be removed? To be sure that it will not be removed during the time necessary for the hearing, which might frequently be indefinitely prolonged, some guard would probably have to be placed over the subject-matter of investigation, which would

involve expense, and might not even then prove effectual. What is the emergency which would render a hearing unnecessary?

We think when the question is one regarding the destruction of food which is not fit for human use the emergency must be one which would fairly appeal to the reasonable discretion of the Legislature as to the necessity for a prior hearing, and in that case its decision would not be a subject for review by the courts. As the owner of the food or its custodian is amply protected against the party seizing the food, who must, in a subsequent action against him, show as a fact that it was within the statute, we think that due process of law is not denied the owner or custodian by the destruction of the food alleged to be unwholesome and unfit for human food without a preliminary hearing. The cases cited by the complainant do not run counter to those we have above referred to.

Even if it be a fact that some value may remain for certain purposes in food that is unfit for human consumption, the right to destroy it is not, on that account, taken away. The small value that might remain in said food is a mere incident, and furnishes no defense to its destruction when it is plainly kept to be sold at some time as food. *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306-322, 26 Sup. Ct. 100, 50 L. Ed. 204-211; *Gardner v. Michigan*, 199 U. S. 325, 331, 26 Sup. Ct. 106, 50 L. Ed. 212, 216.

The decree of the court below is modified by striking out the ground for dismissal of the bill as being for want of jurisdiction, and, as modified, is affirmed.<sup>5</sup>

Mr. Justice BREWER dissents.

<sup>5</sup> See *Pruden v. Love*, 67 Ga. 190 (1881), notice required by statute.

Notice in execution of tax distress warrants, see *Cooley, Taxation*, pp. 441-443.



## CHAPTER 5

## FORM AND PROOF OF OFFICIAL ACTS

## SECTION 18.—DELEGATED ACTION

## REX v. LOCAL GOVERNMENT BOARD.

Ex parte ARLIDGE.

Court of Appeal, King's Bench Division. [1914] 1 K. B. 160.

WILLIAMS, L. J. The affidavit of Sir Horace Monro, the permanent secretary of the Local Government Board, states in paragraph 20 that: "After careful and impartial consideration of the facts and the evidence given at the said inquiry and the report of their inspector, an order was made on the 26th February, 1912, under the seal of the Board, signed by the president, and countersigned by an assistant secretary, confirming the said refusal of the borough council to determine the said closing order." The affidavit does not state by whom the careful and impartial consideration of the facts and the evidence given at the said inquiry was made. I think that the affidavit, if the permanent secretary thought fit to make it, should have stated this. It has been argued that this provision only means that in form the decision has to be the decision of the Local Government Board, and that it must be presumed that the act of consideration and decision was "done" by some officer authorized in accordance with section 5 of the act of 1871. I think that in substance, and not merely in form, the decision must be an act done by the Local Government Board in accordance with section 5 of the act of 1871. It is true that the production of a rule, order, or regulation, signed by the president and countersigned by a secretary or assistant secretary, and the production of such prima facie evidence of any of the said rules, orders, or regulations, as is required by the Documentary Evidence Act, 1868, with respect to the rules, orders, or regulations of the Poor Law Board, shall, until the contrary is shewn, be a sufficient proof that any such rule, order, or regulation of the Local Government Board was duly made. I am not sure that there is not an obligation on the Local Government Board when shewing cause to make it plain that in fact the decision was arrived at by an act of decision done by a member of the Local Government Board or some other duly qualified person or officer. The affidavit of Sir Horace Monro does not express this, and I am not sure that one would not be justified

in saying that the deponent avoids expressing it. I doubt if it is a case which is properly met by any legal presumption that the board in fact complied with a statutory obligation. The obvious reason why the appellant wishes to know who in fact decided, or was deputed to decide, the matters arising on the appeal was to discover whether the person deciding had jurisdiction. \* \* \*

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### LOCAL GOVERNMENT BOARD v. ARLIDGE.

House of Lords. [1915] A. C. 120.

LORD SHAW. But it is said that the respondent is entitled to know his particular judge or judges, to individualize the board, and to demand that that person or those persons so discovered shall give him, the respondent, an audience on the whole material available, including the result of the public local inquiry and the report made thereupon by the board's inspector. In the first place, of the demand to know the individual judge or judges. My Lords, how can the judiciary be blind to the well-known facts applicable not only to the constitution but to the working of such branches of the executive? The department is represented in Parliament by its responsible head. On the one hand he manages its affairs with such assistance as the treasury sanctions, and on the other he becomes answerable in Parliament for every departmental act. His board—that is, all the members of it together—may never meet, or they may only be convened on some question of policy; but a determination, signed and sealed and issued in correct form, stands as the deliverance of the board as such, for which determination the president becomes answerable to Parliament. This is the general rule, acknowledged and familiar, of departmental action and responsibility.<sup>1</sup>

Order of the Court of Appeal reversed.

<sup>1</sup> See *Chapman v. Inhabitants of Limerick*, 56 Me. 390 (1868); *Wilcox v. McConnel*, 13 Pet. 498, 512, 10 L. Ed. 264 (1839); *United States ex rel. French v. Weeks*, 259 U. S. 326, 42 S. Ct. 505, 66 L. Ed. 965 (1922); *Crane v. Nichols (D. C.)* 1 F.(2d) 33 (1924).

As to place of action, see *Lynde v. Winnebago County*, 16 Wall. 6, 21 L. Ed. 272 (1872).

## SECTION 19.—ACTION OF OFFICIAL BODIES

PENNSYLVANIA R. CO. v. MONTGOMERY COUNTY PASS  
RY. CO.

Supreme Court of Pennsylvania, 1895. 167 Pa. 62, 31 A. 468, 27 L. R. A. 766.  
46 Am. St. Rep. 659.

WILLIAMS, J. \* \* \* But in this connection another interesting question suggests itself. How is the assent of "the local authorities" to be obtained in any given case, and what is the proper evidence that it has been given? The township books, in the custody of the town clerk, are the records of the township, and should afford evidence of the action taken by the supervisors in all matters of public importance. A paper in the pocket of a contractor or of some officer of a corporation is not the proper evidence of action by the township or the school district. The action needed is not that of the individuals who compose the board, but of the official body. Thus it was held that a contract signed by the members of the school board separately did not bind the district. The best evidence of their official action was their minutes kept by the secretary. *Wachob v. School Dist.*, 8 Phila. 568. For the same reason a contract signed by the president and secretary was held to be invalid. It had not been acted upon by the board when in session. *School Dist. v. Padden*, 89 Pa. 395.

One supervisor may bind the township by an act that is ministerial in its character. *Dull v. Ridgway*, 9 Pa. 272; *Pottsville Borough v. Norwegian Tp.*, 14 Pa. 543. Not so, however, when the act is one that requires deliberation and the exercise of judgment. *Cooper v. Lampeter Tp.*, 8 Watts, 125; *Union Tp. v. Gibboney*, 94 Pa. 534; *Somerset Tp. v. Parson*, 105 Pa. 360. In such cases the supervisors must be together, and their action must be taken in their official character, and should appear upon the township book kept by the town clerk. If not so taken, it does not bind the township, and has no validity whatever. The supervisors should consider and deliberate upon any application made to them for leave to occupy any of the township roads with a street railway. If they decide to grant the application upon certain terms and conditions, as to the manner and extent of the occupancy permitted and the extent of repairs to be required, these terms should appear in the record of the meeting, as well as the consent; and a contract that does not rest on such official action, properly taken by the proper officers, is utterly worthless. \* \* \*

2 "In the town of Concord the record showed a meeting of the commissioners on August 29, 1914, at which one of the commissioners offered a resolution that they required for road and bridge purposes a tax rate of 61 cents on each \$100 valuation of taxable property, and the resolution was unanimously adopted.



## SECTION 20.—MAJORITY RULE

GRINDLEY *et al.* v. BARKER *et al.*

Court of Common Pleas, 1798. 1 Bos. &amp; P. 229.

EYRE, C. J. The true question in this case lies in a very narrow compass. It is this: What is the operation in law of a judgment of four out of six triers; six being the number constituted to be the triers, and the six being assembled to inquire and try; whether it is to be deemed the finding and judgment of the body, or merely the finding and judgment of the four individuals who concurred? If it is the mere finding of the four who concurred, then this leather is not found insufficient, but if the operation of law on the finding of four, who are the majority of the body, duly assembled, be that their judgment is the judgment of the whole, and therefore the judgment of the triers, then the leather must be taken to have been found insufficient, and the defendants are justified. On the first argument I thought this question would turn on two general heads of inquiry: First, what the general rule of law was in the case of bodies of men intrusted with powers of this nature; whether they must all concur, or whether the decision of the majority would bind the whole? Secondly, supposing the latter to be the general rule, whether that general rule is to be controlled by the intent of the legislature as collected from the scope and provisions of this act?

With respect to the first question, I think it is now pretty well established that where a number of persons are intrusted with powers

The record also showed a regular meeting on the 1st day of September, with all of the commissioners present, when a certificate of the tax rate was made and entered of record, certifying that the board had determined that there should be levied for road and bridge purposes the sum of \$5,000, and this was signed by all the commissioners. It was not necessary that there should be any formal recitation that the meeting was organized, and the statute was complied with. The court did not err in overruling the objections." *People v. Cincinnati, L. & C. R. Co.*, 270 Ill. 516, 519, 110 N. E. 839, 840 (1915).

"Without formal action by the [state] board [of health], directing a nuisance, or the cause of any special disease or mortality, to be abated and removed, its secretary can neither speak nor act for it in ordering the abatement and removal of the nuisance, and the disregard of an order so given is not indictable." *Com. v. Yost*, 197 Pa. 171, 46 A. 845 (1900).

See *Chicago & N. W. R. Co. v. Dey*, 35 F. 866, 883, 1 L. R. A. 744 (1888). "An official board acts through its secretary. This complainant with others addressed an official communication to the board. He received an answer in the regular way—one signed by the secretary as secretary. Equity and good faith forbid going behind such official notification."

So, under circumstances, acquiescence and assent may be evidenced by inaction or conduct; i. e., informally. *Bartlett v. Boston*, 182 Mass. 460, 65 N. E. 827 (1903); *State v. Rohart*, 83 Minn. 257, 86 N. W. 93, 333, 54 L. R. A. 947 (1901).

not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole. The cases of corporations go further. There it is not necessary that the whole number should meet; it is enough if notice be given; and a majority, or a lesser number, according as the charter may be, may meet, and when they have met they become just as competent to decide as if the whole had met.<sup>3</sup> With a view to this case, those who have met resemble the six triers who have authority to decide: and then a question arises, how they may act when they have met. The case in *Atkyns*<sup>4</sup> shows the opinion of a great judge, Lord Hardwicke, who was much conversant with this subject in one part of his judicial life, that the majority of persons assembled will conclude the minority; and an act done by them will be the act of the whole body. And that part of the law of corporations applies to this case; that with regard to powers not merely private, which are to be exercised by many persons, provided a sufficient number be assembled, the act of the majority concludes the minority, and becomes the act of the whole body. \* \* \* If that be so, the argument drawn from the word "triers" being used generally, in the thirty-third and forty-sixth sections, will not stand much in our way; because the judgment of four triers in this case is the judgment of all, as much as if all had concurred. There is nothing, then, in the general rule of law, to prevent this finding from being held good. \* \* \*<sup>5</sup>

<sup>3</sup> On this point see *Throop, Public Officers*, § 112.

<sup>4</sup> *Attorney General v. Davy*, 2 *Atk.* 212 (1741).

<sup>5</sup> The discussion of the second question is omitted.

"It cannot be disputed that, wherever a certain number are incorporated, a major part of them may do any corporate act; so if all are summoned, and part appear, a major part of those that appear may do a corporate act, though nothing be mentioned in the charter of the major part." Lord Hardwicke, in *Attorney General v. Davy*, 2 *Atk.* 212 (1741).

"It is a well-established rule that, in order to constitute a good corporate assembly in the case of a corporation consisting of a definite and an indefinite body, there must be present a majority of that number of which the definite body consists, although it is not necessary that there should be a majority of the indefinite body." *Blacket v. Blizard*, 9 *Barn. & C.* 851, 860 (1829).

See, also, *Martin v. Lemon*, 26 *Conn.* 192 (1857).

"The rule of the common law, which is now declared by statute, that where an authority is to be exercised by more than one officer they must all concur in its exercise, or all meet and consult and a majority agree to the act, is subject to the necessary qualification that, if one is notified to attend and refuses, it is the same as if he had attended and dissented from the act." *Horton v. Garrison*, 23 *Barb. (N. Y.)* 176, 179 (1856).

See, also, *Williams v. School District*, 21 *Pick. (Mass.)* 75, 82, 32 *Am. Dec.* 243 (1838), "if there be a quorum."

See *Wilson v. Alabama Gt. Southern R. Co.*, 77 *Miss.* 714, 28 *So.* 567, 52 *L. R. A.* 357, 78 *Am. St. Rep.* 543 (1900); *McQuillin, Municipal Corporations*, §§ 573-616.

## SECTION 21.—REQUIREMENT OF RECORD PROOF

## MEEKER v. VAN RENSSELAER.

Supreme Court of Judicature of New York, 1836. 15 Wend. 397.

The declaration charged the defendant with pulling down five dwelling houses. \* \* \* The defendant proved that the board of health of the city had directed the nuisance to be abated. To this proof the plaintiff objected, insisting that the minutes of the board or written evidence of their orders should be produced. The objection was overruled, and parol evidence was received. \* \* \*

SAVAGE, C. J. \* \* \* It was objected that parol evidence should not have been received of the orders of the board of health. This objection was well taken. The board of health is a tribunal created by statute, clothed with large discretionary powers; and, being a public body, its acts should be proved by the highest and best evidences which the nature of the case admits of. Every proceeding of a judicial character must be in writing. It is not to be presumed that minutes of their proceedings are not kept by such a body, and that determinations which seriously affect the property of individuals, were not reduced to writing, but rest in parol. In the case of *Van Wormer v. City of Albany*, 15 Wend. 262, the minutes of the proceedings of the board were incorporated with the proceedings of the corporation, of which the board of health were members, and were proved by a witness a member of both boards. \* \* \*

## GILBERT v. COLUMBIA TURNPIKE CO.

Supreme Court of Judicature of New York, 1802. 3 Johns. Cas. 107.

Application by E. Gilbert to set aside an inquisition found by three commissioners appointed under the second section of the act amending the act establishing the Columbia Turnpike Company, passed March 28, 1800.

PER CURIAM. This is the case of a special power granted by statute, and affecting the property of individuals, which ought to be strictly pursued, and appear to be pursued, on the face of the proceedings. 4 Burr. 2244; Cowp. 26; 1 Burr. 377; 7 Term Rep. 363. This is an established rule, and it is important that it should be maintained, especially in cases which so materially interfere with private rights. It does not appear that any disagreement existed between the parties, or that in consequence of any disagreement the company applied to a judge, both of which were requisite, to authorize the appointment



of commissioners. The disagreement, and consequent application, were the foundation of the whole proceedings, and without them the judge could have no jurisdiction in the case. As they do not appear, we are not to intend they existed.

The judge, in the case before us, is required by the act to have no interest in the road; and it is also required that the commissioners shall not be inhabitants of any of the towns through which the road shall pass. Neither of these points, which are essential to an impartial result, appear to have been complied with, and both are indispensable.

A notice to the owners, it is true, is alleged to have been given, but it is not stated to have been in writing. A notice, in legal proceedings, means a written notice, and we think the act itself, in this instance, contemplates such a notice. In certain cases, it directs the notice to be left at the dwelling house of the party. This must intend a written notice.

On these grounds, without determining the other objections, we are clearly of opinion that the inquisition ought to be set aside.

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### HARBAUGH et al. v. MARTIN.

Supreme Court of Michigan, 1874. 30 Mich. 234.

COOLEY, J. Certiorari is sued out in this case to reverse the proceedings of the drain commissioner in assessing upon the plaintiffs in error and others the expense of deepening and widening the Prairie Ronde ditch, in the township of Springwells. The proceedings purport to have been had under chapter 47, p. 570, of the Compiled Laws of 1871, the fourth section of which requires the county drain commissioner, upon the application to him in writing of ten or more owners of land in each township in or through which they ask to have a drain constructed, to institute proceedings for that purpose, with a proviso, however, that "the petition, except when the same is asked for upon sanitary reasons only, shall be signed by a majority of the resident owners of the lands through or into which said drain is proposed to be constructed." The petition in this case did not ask action upon sanitary reasons. It was signed by twenty-one persons, who style themselves "citizens and freeholders of Springwells"; but there is no finding in the case, nor even any recital in any of the papers which make up the record of the proceedings, that these twenty-one persons constitute a majority of the resident owners of the lands through or into which the drain was constructed. A subsequent paper presented to the commissioner as a waiver of a jury to assess damages, etc., is signed by nearly all the same persons, with some others, who are therein recited to be "a majority of the resident owners of the property affected by the said drain"; but this cannot aid

the petition, for other property is usually affected by a drain besides that into or through which it extends.

It is said, however, that the commissioner in these cases may act upon his own knowledge of the facts. If that be admissible, which we do not decide, the record must in some manner show that he possessed the requisite knowledge to justify his action. The record cannot be aided by knowledge which the commissioner conceals in his own breast; it must be complete in itself, and all jurisdictional facts must appear upon the face of it. In this case nothing appears to show that the petition was sufficiently signed until the commissioner makes return to this court. But assertions in that cannot cure defects in his record. *People v. Highway Commissioners*, 14 Mich. 528. \* \* \*

The proceedings must be quashed.<sup>6</sup>

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### WHITELEY v. PLATTE COUNTY.

Supreme Court of Missouri, 1880. 73 Mo. 30.

NORTON, J. The controversy in this case grows out of the action of the township board of directors of Weston township, Platte county, in locating a new road over the land of plaintiff in said township. Plaintiff appealed from the action of said board to the county court of said county, in which court he filed his motion to set aside the order establishing said road, because it was made without notice to plaintiff, and because the said board had no jurisdiction to make it. The court overruled the motion, whereupon the plaintiff appealed to the circuit court, and renewed his motion to set aside said order because the township board had acquired no jurisdiction to establish said road, and because the order establishing it was made without notice to him. This motion being overruled, plaintiff appeals to this court.

The only question which the record presents is whether or not the township board in the various steps taken had acquired jurisdiction. This being a statutory proceeding in invitum to appropriate to the use of the public the land of plaintiff, and being in derogation of common law and common right, "the utmost strictness is required in order to give it validity; and unless upon the face of the proceeding it affirmatively appear that every essential prerequisite of the statute conferring the authority has been fully complied with, every step, from inception to termination, is *coram non iudice*." *Ells v. Pacific*

<sup>6</sup> See, also, *McGregor v. Supervisors*, 37 Mich. 388.

"In a proceeding to establish or vacate highways in this state the statutes have uniformly required that the petitions should be signed by twelve freeholders of the county, six of whom shall reside in the immediate neighborhood of the highway proposed to be located or vacated (section 7649, Burns' Ann. St. 1908); but it has been held that it was not necessary to the sufficiency of the petition that said facts be alleged therein [citing authorities]. Anything in *Conaway v. Ascherman*, 94 Ind. 190 (1884) to the contrary is overruled." *Ætna Life Ins. Co. v. Jones*, 173 Ind. 149, 89 N. E. 871 (1909).

R. R., 51 Mo. 200. The township board could only acquire jurisdiction to lay out a new road and assess damages as is provided in sections 24, 25 and 27, p. 110, of the act of 1873, that being the act under which the proceeding was had. These sections are as follows:

24. "The township board of directors may lay out or discontinue or alter any road, or lay out any new road, when petitioned for by any number of legal voters, who shall be householders of said township, not less than twelve, residing within three miles of the road so to be altered, discontinued or laid out; said petition shall set forth in writing a description of the road and what part is to be altered or discontinued; and if for a new road, the names of owners of land, if known, over which the road is to pass, the point at which it is to commence, its general course, and the place at or near which it is to terminate."

25. "Whenever any number of legal voters determine to petition the township board for the alteration or discontinuance of any road, or laying out a new road, they shall cause a copy of their petition to be posted up in three of the most public places in the township, at least twenty days before any action shall be had in reference to said petition."

27. "The damages sustained in consequence of the laying out, opening or altering a road, when the parties interested therein cannot agree, shall be ascertained and assessed by the township board."

It is clear from these statutory provisions that it is an indispensable prerequisite to laying out a new road that the petition for the same must be made by twelve legal voters and householders of the township living within three miles of the proposed road, and that a copy of such petition must be posted in three of the most public places in the township at least twenty days before any action can be taken in reference to it. These facts are jurisdictional and must affirmatively appear in the proceedings, and unless they do so appear no jurisdiction is conferred, and none can be exercised. The object of requiring a copy of the petition to be posted up was to impart notice to the landowner that the public proposed to make an appropriation of his property to a public use, and completely deprive and divest him of all control over the same; and in order that such notice might be effectual, it is not only provided that such copy shall be posted up in three places in the township where the road is proposed to be established, but that these places must be three of the most public places in the township. The record before us entirely fails to show a compliance with the law in these respects, it only appearing therefrom "that it was proved to the satisfaction of the board that notice of the opening of said road had been posted in three places along the line of the road for twenty days previous to this date." Neither does it appear from the face of the petition, or any other part of the record, that the road was petitioned for by twelve legal voters and householders of the township living within three miles of the road. The persons signing the petition are designated as citizens of Weston township.



It therefore follows that, as the facts necessary to confer jurisdiction on the township board do not affirmatively appear, under the rulings of this court in the case of *Ells v. Pacific R. R.*, supra, and the case of *Carpenter v. Grisham*, 59 Mo. 247, the judgment must be reversed and the cause remanded to be disposed of in conformity with this opinion. All concur.

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PEOPLE ex rel. GREENWOOD et al., Highway Com'rs, v. BOARD  
OF SUPERVISORS OF MADISON COUNTY.

Supreme Court of Illinois, 1888. 125 Ill. 334, 17 N. E. 802.

Appeal from Appellate Court, Fourth district.

Proceeding by mandamus by Peter Greenwood, J. M. Kendall, and John T. Brown, Highway Commissioners of the Town of Wood River, against the Board of Supervisors of Madison County, to compel an appropriation of one-half of the cost of building a bridge in the town of Wood River. Mandamus denied, and relators appeal.

SHOPE, J. \* \* \* The main controversy, however, arises upon the instruction given by the court directing a verdict for the defendant. As the case stood at the time the instruction was given, it was entirely competent for the court, and correct practice, to direct a verdict for the defendant, for the reason that there was not before the jury sufficient evidence to support a verdict for the relators. But back of this instruction lay the action of the court in rejecting the evidence offered by the relators. If the offered evidence was competent, and tended to sustain the issues on behalf of the relators, its rejection was erroneous, and the instruction improperly given.

Under the practice prevailing prior to the present statute relating to mandamus, the alternative writ became the foundation of all subsequent proceedings in the case, answering the same purposes as the declaration in ordinary actions. This being so, it was necessary that the alternative writ should show upon its face a clear right in the relator to the relief demanded. Therein the relator was required to distinctly set forth all the material facts on which he relied, so that the same could be admitted or traversed. *Trustees v. People*, 12 Ill. 248, 52 Am. Dec. 488. The statute referred to (*Starr & C. Ann. St.* 1896, p. 1584), while it has changed the practice, dispensing with the issuance of the alternative writ, and requiring the defendant to answer, plead, or demur to the petition, has not modified or dispensed with the common-law requirement resting upon the relator to set forth and show a clear and indubitable right to the relief demanded. In every case, to entitle the relator to relief, it must appear that the defendant is under a legal obligation to do and perform the act required, and every material fact necessary to show such legal duty must be averred in the petition. *Hall v. People*, 57 Ill. 307; *People v. City of Elgin*, 66 Ill. 507; *People v. Village of Crotty*, 93 Ill. 180.

The act in relation to roads and bridges under township organization, approved May 28, 1879, and in force July 1, 1879 (Laws 1879, p. 257), is broad and comprehensive in its terms and provisions, embracing within its scope the establishment, alteration, construction, repair, maintenance, and supervision of roads and bridges within organized towns. The immediate control and supervision of roads and bridges in a town was vested in three commissioners of highways, who were required to meet at a designated time and place, and to organize by choosing one of their number treasurer, and thereafter to fix their own time and place of meeting; and, by the thirteenth section of the act, the commissioners were required to "keep a correct record of their proceedings at all meetings." Although reference is here made to the particular act named, in prior as also in subsequent acts similar provisions appear, and like powers were vested in, and duties imposed upon, these boards of highway commissioners; and they are now, and were under this particular act, regarded and held to be a quasi corporation, powerless to act except together and as a body (*Commissioners v. Baumgarten*, 41 Ill. 254; *McManus v. McDonough*, 107 Ill. 95), and of which action, as we have seen under the act of 1879, they were required to "keep a correct record." It seems clear that the same rules of law are to be applied to this corporate body, in respect to its corporate action, and the evidence of such action, as are applied to other municipal corporations; and that the record of its action, required by law to be made and kept, becomes the best, and, if in existence and capable of being produced, the only evidence thereof.

The 110th section of the act of 1879 provided under what circumstances a moiety of the expense of the construction of a bridge in any town might be borne by the county. To avail of such county aid, and as the basis of any action to that end by the county authorities, it must appear (1) that a necessity existed for the construction or repair of such bridge; (2) its construction or repair must be an unreasonable burden on the town; (3) the cost must exceed such sum as could be raised in one year by ordinary taxation for bridge purposes in the town; and (4) that one-half the necessary funds therefor had been provided by the town. These facts are by the law made jurisdictional; and, without their existence and concurrence, the county board was without power to appropriate money from the county treasury for the purpose stated. The determination of these jurisdictional facts is by the act left to the commissioners of highways. Acting, as alone they had the power to act; together and as a board, at a meeting of the board, they were to determine that the construction or repair of a bridge within their territorial jurisdiction was necessary; that its construction or repair would be an unreasonable burden on the town; that the cost thereof would exceed the sum that could have been raised in one year by ordinary taxation for bridge purposes in the town; and that they, by means under their control, had provided for one-half the necessary expense—

of which determination they were required by the act to make and keep a record. And this same section of the act (section 110) made it the imperative duty of the county board, whenever the commissioners of highways of a town brought themselves within the provisions of the act, to appropriate out of the county treasury one-half the cost of the proposed construction or repair. In the case under consideration, the commissioners of highways of Wood River township sought to avail of the provisions of the act referred to; and, if the case made by their petition and proofs was such as to bring them within the law, the writ should have been awarded.

By the averments of relators' petition a *prima facie* case was made. Issue being taken thereon, it became necessary for relators to maintain, by competent testimony, the truth of every material averment; taking upon themselves the same burden that rests upon the plaintiff in an ordinary action at law where the averments of the declaration are put in issue. To meet this requirement the relators produced as a witness the town clerk of Wood River, who was also the clerk of the commissioners of highways for the year 1882, who testified that the commissioners held meetings on April 19, August 19, and September 2, 1882; and, on his being asked if the commissioners of highways of the town did not determine to build a bridge, an objection was interposed by the defendants, and sustained by the court. This ruling of the circuit court was unquestionably correct. As we have before stated, the determination by the commissioners of highways that a necessity existed for the construction or repair of a bridge, as a basis for an application to the county board for county aid under the statute, was an exercise of a corporate power vested in the commissioners of highways, which could only be at a meeting of the commissioners, and be shown by the record required by the law to be made and kept. Before the county board could be legally moved in the matter, or any legal duty be cast upon them, the commissioners must have determined that such necessity existed, and have preserved the evidence of that fact in their record. In the proceeding then before the circuit court, the corporation, the commissioners of highways, could only speak by their record, unaided by parol testimony.

The principles announced seem to be well supported by authority. Where the law requires records to be kept, they are the only lawful evidence of the action to which they refer, and such record cannot be contradicted or supplemented by parol. The whole policy of the law would be defeated if they could rest partly in writing and partly in parol. *Stevenson v. Bay City*, 26 Mich. 44; *Hall v. People*, 21 Mich. 456; *Morrison v. City of Lawrence*, 98 Mass. 219; *Hunneman v. Fire Dist.*, 37 Vt. 40; *Mayhew v. District of Gay Head*, 13 Allen (Mass.) 129. So, where county commissioners and township trustees were required by law to keep a true record of their proceedings, it was held that they could "only speak by their record" when legally assembled. *Commissioners v. Chitwood*, 8 Ind. 504. And, where school districts



are required by law to keep an account of their proceedings by a sworn clerk, such proceedings can only be proved by the record. Offered parol proof was rejected. *Jordan v. School Dist.*, 38 Me. 164. And in respect of the county court in counties not under township organization, constituting in such counties the county board, having the management and control of the fiscal affairs of the county, it was held that, in matters of allowance or rejection of claims against the county, the records of the court are the only admissible evidence of their official acts. *McHaney v. Marion Co.*, 77 Ill. 488.

The relators read in evidence the record of the commissioners of highways of August 19, 1882, as follows: "The amount of taxes was fixed at forty (40) cents for bridges, and twenty (20) cents for roads; for making and repairing bridges, \$6,000.40; for other purposes, \$2,100.01; total, \$8,100.41. Moved to petition county for aid in building bridge over Wood river. Carried." And offered, in that connection, to prove by their clerk that, at the meeting on August 19th, it was determined to build the particular bridge; that it was necessary it should be built; that its construction would be an unreasonable burden on the township; that a tax was levied by the commissioners for the purpose of providing one-half the estimated cost thereof; that the estimated cost was \$5,000; and that the memorandum on the records was the result of the determination and action of the commissioners. The court sustained an objection to the offered testimony. The offered testimony was in the highest sense material; and, had it been embodied in the record of the commissioners, it would have tended to establish every material averment of the petition. But the imperfect record of the determination and action of the commissioners could not thus be cured and aided by parol. Considerations of the gravest character require us to hold that, where the law has required a record to be kept of corporate action by any of the agencies of the state, the record alone can be resorted to to establish such action in all collateral proceedings.

Further offers of proof were made by relators in respect to the estimate by the commissioners of the sum needed for making and repairing bridges for the year 1882, including one-half the cost of this new bridge; that an estimate of the cost of this bridge was procured from the county surveyor, of which, however, no record was made; of the rate per cent. of the levy for bridge purposes; of the amount collected and turned over to the commissioners, and what part of it was for this new bridge,—to all of which objection was sustained. As will be seen, every material fact offered to be proved by parol should have appeared in the record of the action of the commissioners, or was capable of proof by the public records of the county, and the ruling of the circuit court was correct.

Relators did read in evidence their petition to the county board asking for county aid, and also the record of the action of the county board thereon, from which it appeared an allowance from the county treasury was made of \$1,000. The fact that the county board was peti-

tioned for county aid might, no doubt, be shown by the petition itself; but such petition, though made and signed by the commissioners, cannot be regarded as proof of the facts recited therein, so as to supply the absence or take the place of the record of the commissioners' action required by the law to be kept. \* \* \*

Perceiving no error in the judgment of the Appellate Court, it is affirmed.<sup>7</sup>

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STATE v. WEIMER.

Supreme Court of Iowa, 1884. 64 Iowa, 243, 20 N. W. 171.

Appeal from Lee district court.

Defendant was convicted of obstructing a highway, and now appeals to this court.

BECK, J. The only evidence introduced by the state to prove that the road, for the obstructing of which defendant was indicted, is a lawfully established highway, consists of the commissioners' road record, a book in the custody of the auditor of the court, and an official copy of the original plat of the road. There was evidence tending to show that the road indicated by these records had been opened, and afterwards obstructed by defendant.

The road record fails to show that the notice required by the statute (Code, § 936) had been given, and there is no recitation or averment therein tending to show that any notice was given to defendant upon whose land, it appears to be claimed, the road was located. Nor does the record show that defendant appeared in the proceeding, and thus waived service of notice. It is recited that the road was "by consent of attorneys of parties herein, and request of board, declared to be forty feet in width." But it is not shown by the record, nor by evidence aliunde, if, indeed, it were competent, which we do not determine, that defendant appeared to the proceedings, or had notice thereof at any time, or that he was a party to the case before the supervisors. The defendant proposed to prove that, by an agreement between the board of supervisors and himself, the road was to be established as of the width of thirty-three feet. But, upon the objection of the state, this evidence was rejected. There was no evidence of any character tending to show that defendant was served with the notice required by law, or waived service thereof.

This court has held in a similar case that, as the petition and notice required by law in proceedings to establish roads are necessary to confer jurisdiction upon the supervisors in road cases, they must be shown by the record, and that, in the absence of such showing, no presumption will obtain in support of the jurisdiction of the supervisors. *State v. Berry*, 12 Iowa, 58. There being no evidence that the supervisors

<sup>7</sup> See *County of Du Page v. Commissioners of Highways*, 142 Ill. 607, 32 N. E. 269 (1892), post, p. 309.

acquired jurisdiction to establish the road in this case, and no presumption thereof authorized by law, the proceedings are void. *Alcott v. Acheson*, 49 Iowa, 569.

We understand that the court below, in the second instruction, held that the records of the supervisors conclusively prove that the highway was lawfully established. The instruction, in the form we find it in the abstract, is not clearly expressed, but it certainly recognizes the sufficiency of the record to show that the road was a lawful highway. The instruction is erroneous. On the contrary, the jury should have been informed that the evidence failed to show that the road obstructed by defendant was established by law. As these considerations are decisive of the case, other questions argued by counsel need not be considered.

The judgment of the district court is reversed.<sup>8</sup>

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## SECTION 22.—SUPPOSED RELAXATION OF THE REQUIREMENT

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### McCOY v. CURTICE.

Supreme Court of Judicature of New York, 1832. 9 Wend. 17, 24 Am. Dec. 113.

*Trover*. Defendant justified as collector under a warrant signed by two trustees of a school district.

SUTHERLAND, J.<sup>9</sup> \* \* \* The next objection was to the introduction of the warrant, on the ground that it was signed only by two trustees. I am inclined to think the objection was properly overruled. Where power is delegated to two or more individuals for a mere private purpose, in no respect affecting the public, it is necessary that all should join in the execution of it. Thus arbitrators must all unite in an award. But in matters of a public concern, if all are present, the majority can act, and their acts will be the acts of the whole. 1 Bos. & Pull. 236; 3 T. R. 592; *Green v. Miller*, 6 Johns. 41, 5 Am. Dec. 184. There can be no doubt that a contract made by all of the trustees and signed by two would be binding, or that two could contract against the will of the third, if he was duly notified or consulted and refused to act. The convenient dispatch of public business re-

<sup>8</sup> "The order of revocation was introduced without objection; but, if it contained no statement showing a jurisdiction in the board, it certainly was insufficient for that purpose; and it contains nothing which indicates, that they proceeded under a written complaint." *State v. Lamos*, 26 Me. 258 (1846), *supra*, p. 188.

See *Little v. Denn*, 34 N. Y. 452 (1866).

<sup>9</sup> For first part of opinion, see post, p. 319.



quires that it should be so. *Ex parte Rogers*, 7 Cow. 526, and cases there cited.

The objection here was simply that the warrant was not signed by all the trustees. There is nothing to show, or from which it is to be inferred, that all the trustees did not concur and act in the previous proceedings, and assent to the issuing of the warrant. In *Yates v. Russell*, 17 Johns. 468, which was a writ of error upon a judgment entered upon the report of referees, in an action not referable under the statute, the report was signed by only two of the referees, and one of the errors relied upon was, that it did not appear that all the referees met and heard the parties. It was held by Chancellor Kent, who delivered the opinion in the Court of Errors, that it was to be presumed that all the referees met, as nothing appeared to the contrary; and if they did not, the objection should have been taken in the court below. That principle seems to be applicable to this case and disposes of this point.

Judgment affirmed, with double costs.

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NEALY v. BROWN et al., County Com'rs.

Supreme Court of Illinois, 1844. 1 Gilman, 10.

Debt on the statute for obstructing a public highway. The cause was heard in the Greene circuit court, before Hon. Samuel D. Lockwood and a jury, at the October term, 1843; the venue having been changed from Jersey county. The jury found a verdict against the defendant below, and a fine of \$20 was imposed, from which judgment he prosecutes his writ of error in this court.

CATON, J. This was an action of debt for obstructing a public highway, commenced before a justice of the peace of Jersey county, and appealed to the circuit court of that county, whence the venue was changed to the circuit court of the county of Greene. The record presents two bills of exceptions, from the first of which it appears that, upon the trial of the cause, the plaintiffs below offered in evidence a certified copy of an order of the county commissioners' court of Jersey county, which refers to and adopts the report of the viewers appointed to view and locate the road for the obstruction of which this suit was brought, and establishes said road as a public highway, and directs that the same be opened and kept in repair according to law. To this the defendant objected, but the court allowed it to be read, and this we will first examine.

Was it necessary, before it was competent to read this order, to show that all the previous steps required by the statute had been taken? We think not. The county commissioners are vested with exclusive jurisdiction over all matters in relation to roads in their respective counties, and we are satisfied that sound policy and the pub-

lic good require that we should presume that the antecedent proceedings had been regular, subject, however, to be rebutted by the other party. If we go behind the order, I know not where we might stop. Should the plaintiff show that a petition was presented, signed by the requisite number of persons, and should he be required to prove that all were legal voters, that the viewers were qualified to act as such, and were sworn, and all the other minute inquiries which ingenuity could invent? Should such be held to be the law, we should be drawn into the trial of a great number of collateral issues in no wise important to the justice of the case. Should such a rule be adopted, most, if not all, of the public roads in the older counties might be shut up to-morrow with impunity.

In the case of *Eyman v. People*,<sup>10</sup> decided at the September term, 1842, 1 Gilman, 8, this court went farther than we are now called upon to go. There it was held that it was not necessary to produce any record evidence of the road. In that case the court say: "It is insisted that the original survey and plat of the road, and the records of the commissioners' court approving the same, and directing the road to be opened, should have been produced as the best evidence that it was a public road. No authority has been cited, nor are we aware of any adjudicated case sustaining this position. The practice would be very inconvenient, and would tend rather to defeat than promote the ends of justice. If the road is used and traveled by the public as a highway, and is recognized and kept in repair as such by the county commissioners and supervisor, whose duty it is by law to open and repair public roads, proof of these facts furnishes a legal presumption, liable to be rebutted, that such road is a public highway."

The laying out and opening of roads is not an exercise of judicial powers, and hence the position that no presumptions are to be indulged in their favor is not tenable. As well might he, who is affirming the sale of school land, be required to show that a petition for the sale of the land had been presented by the requisite number of householders of the township. \* \* \* 11

<sup>10</sup> Indictment of county commissioners for omission of duty in neglecting to cause repairs to be made.

<sup>11</sup> The rest of the opinion is omitted. It is stated in the further course of the opinion that from the record it does not appear that any evidence was given tending to establish that the road obstructed was on defendant's land.

## GALBRAITH v. LITTIECH.

Supreme Court of Illinois, 1874. 73 Ill. 209.

Mr. Chief Justice WALKER delivered the opinion of the court.

This suit was brought by appellee, as supervisor of roads in Henderson county, before a justice of the peace, to recover a penalty from appellant for obstructing a public highway. A trial was had before the justice, and resulted in a recovery of one dollar and costs. An appeal was prosecuted to the circuit court, and a change of venue was had from that county to the Mercer circuit court. A trial was there had, resulting as it did before the justice of the peace. A motion for a new trial was entered, but overruled by the court, and the case is appealed to this court.

All the grounds urged for a new trial are of the most technical character. It is first insisted that but two of the viewers appointed by the county commissioners acted in laying out the road, and it is therefore illegal. Appellant concedes that, had all acted, the concurrence of the two would have answered the requirements of the law. Whether all three joined in the report, still we must presume that all three did act, although but two signed the report.

In the cases of *Nealy v. Brown*, 1 *Gilman*, 10, *Ferris v. Ward*, 4 *Gilman*, 499, and *Dumoss v. Francis*, 15 Ill. 543, it was held that on presenting the order of the county commissioners establishing the road, it would be presumed, until disproved, that all the antecedent steps required by the statute had been taken. In this case the order establishing the road was introduced, and also the report signed by two of the viewers. It did not state that the other failed or refused to act with them, and, failing to state that fact, we must presume that he was present and so acted—nor can the presumption as to that fact be overcome by parol evidence. We will presume that the county commissioners heard evidence, that the other commissioner acted, but failed to join in the report, and the presumption is not contradicted by the record. This is a complete answer to that objection. \* \* \* 12

12 "I adhere to the rule laid down in *Nealy v. Brown et al.*, 1 *Gilman* (Ill.) 10 [1844], and which I had supposed to prevail in this state, that where the question of the existence of a public highway comes up collaterally, as in this case, it is enough, in the first instance, to introduce in evidence the order establishing the road, without making proof of the previous steps required by the statute for laying out the road; that the presumption is, that the antecedent proceedings had been regular, subject, however, to be rebutted. There was no evidence in the present case rebutting the presumption that the antecedent proceedings had been regular—no evidence that a copy of the petition and notices had not been posted—all that appears is, that the proceedings, on their face, do not show such posting." Sheldon, C. J., dissenting, in *Frizell v. Rogers*, 82 Ill. 109 (1876).

Highway Law Ill. 1913, § 94 (Smith-Hurd Rev. St. 1927, c. 121, § 101): The records of the town or district clerk, or a certified copy of such record and papers, relating to the establishment, location, alteration, widening or vacation of any road shall be prima facie evidence in all cases that all the necessary



## LINGO v. BURFORD.

Supreme Court of Missouri, 1892. 112 Mo. 149, 20 S. W. 459.

GANTT, J. This is a proceeding by injunction, commenced in the circuit court of Johnson county, by which the plaintiff sought to restrain the defendant, Burford, as road overseer, from opening a public road over and through lands of the plaintiff, under an order of the county court.

The material averments of the petition are that "no legal notice was ever given of the presentation of a petition for such an order; that the county commissioner did not survey, view, or mark out a roadway over said land, or take relinquishments of right of way for same, or ask for such relinquishments, or make any report of his action, as the law requires, and that plaintiff has never in fact relinquished the right of way for a road over said land; that there has never been any assessment of damages to be done the land of the plaintiff by the establishment of said road; that the pretended order of record establishing said road is void upon its face, for want of jurisdiction to make the same."

The plaintiff, to sustain his case, introduced the record of the proceedings in the county court. The petition on its face alleged that the petitioners were freeholders of Chilhowie and Post Oak townships, through which said proposed road ran; that it was signed by at least 12 freeholders of said township, and it specified the proposed beginning, course, and termination, with not less than two points named on the direction. Section 7796, Rev. St. 1889. It was presented and publicly read at the regular August term of the county court, 1887.

The record made by the county court at that term is as follows: "Now, at this day, is presented to the court the petition of A. J. Dun-

antecedent provisions have been complied with and that the action of the commissioners or other persons and officers in regard thereto was regular in all respects.

See Wigmore on Evidence, § 2534.

But see *Wilson v. Alabama Great Southern Railroad Company*, 77 Miss. 714, 28 South. 567, 52 L. R. A. 357, 78 Am. St. Rep. 543 (1900); "The presence of all three members of the executive committee of the state board of health was necessary to a valid order on September 15, 1897, when the order in question was made. Laws 1894, p. 33, c. 38. This is made clear as the legislative purpose by the amendment (Laws 1898, p. 93, § 2), providing, for the first time, that 'the presence of two members of the executive committee' would do thereafter. The order in question was made by only two members; it not being shown that three were present. \* \* \* Had three been present, and two made the order, this objection would have been obviated."

See, also, 1 Rev. St. N. Y. (1st Ed.) pt. 1, c. 16, tit. 1, § 125: "Any two commissioners of highways of any town may make any order, in execution of the powers conferred in this title; provided it shall appear in the order filed by them that all the commissioners of highways of the town met and deliberated on the subject embraced in such order, or were duly notified to attend a meeting of the commissioners for the purpose of deliberating thereon.

See *People v. Williams*, 36 N. Y. 441 (1867).

ham et al., praying for the establishment of a public road forty feet in width in Chilhowie and Post Oak townships, to run as follows: [Here follows a minute description of the route.] And the court having heard said petition publicly read, and it being proven to the satisfaction of the court that it is signed by at least twelve freeholders of Chilhowie and Post Oak townships, three of whom are of the immediate neighborhood of said proposed road, and that due notice has been given according to law, and that said proposed road is of public utility and practicability, it is ordered that the county commissioner proceed to view, survey, and mark out said road, and report the practicability of said road, together with the distances and situation of the ground, the names of the parties granting the right of way, and the estimated cost of building needed bridges, at the next regular term of this court."

At the next November term, the county road commissioner filed his report, showing the landowners who had relinquished the right of way and those who had not. Among those who had failed or refused to relinquish, he reported the plaintiff, H. J. Lingo, and that he claimed \$100. Thereupon the county court, as required by section 7799, Rev. St. 1889 (section 8, p. 247, Laws 1887), by its order of record, appointed three disinterested freeholders to act as a jury, view the premises, and assess the damages of those who had failed or refused to relinquish the right of way. At the next February term, the commissioners thus appointed made their report, in which they returned that they had viewed the premises, and assessed the damages of each tract of land separately, and the report as to the plaintiff was as follows: "To H. J. Lingo, at end N. E. N. E. section 26, township 44, and range 26—no damages."

Thereupon the court made the following order: "Now, at this day is taken up the report of the commissioners heretofore appointed to assess the damages resulting to the premises of L. P. Fisher, H. J. Lingo, and others, by reason of the establishment of a public road petitioned for by A. J. Dunham et al., from which the court finds that said commissioners have viewed the premises of the parties aforesaid, and have allowed no damages; and no objections being filed to the verdict of said jury, and it appearing to the court that said proposed road is of sufficient utility to justify opening and improving the same for public travel, it is therefore ordered that a public road forty feet in width be opened, and run as follows: [Describing the route particularly.]"

The circuit court granted a perpetual injunction against the road overseer, from which he appeals to this court.

The contention arises as to the jurisdiction of the county court to order the road opened. Plaintiff in error insists that the record of recital of the county court "that due notice has been given according to law," nothing further appearing, was sufficient in this collateral proceeding to show jurisdiction in that court, so far as it was es-

sential to show notice, whereas defendant in error maintains that the recital is insufficient.

That the county court was only authorized to entertain the proceeding to condemn plaintiff's land for the road, upon notice given as required by the statute (section 7797),<sup>13</sup> is not to be questioned, but it is a well-settled principle that, where the jurisdiction of an inferior court depends upon a fact which said court is required to ascertain and settle by its decision, its decision is conclusive as against a collateral attack. *Jackson v. State*, 104 Ind. 516, 3 N. E. 863; *In re Grove Street*, 61 Cal. 438; *People v. Hagar*, 52 Cal. 171; *Shawhan v. Loffer*, 24 Iowa, 217; *Porter v. Purdy*, 29 N. Y. 106, 86 Am. Dec. 283; *Lewis, Em. Dom.* § 605; *Black, Judgm.* § 288; *Elliott, Roads & S. p.* 243; *State v. Smith*, 105 Mo. 6, 16 S. W. 1052.

The county court had original exclusive jurisdiction to hear and determine, upon a proper petition and due notice, whether a new public road should be established over the route designated in the petition. The petition stated every fact necessary to give the court jurisdiction of the subject-matter. Twenty days' notice of this application was required. The statute required "proof of notice having been given as required." The county court was the tribunal authorized to hear and determine the sufficiency of the proof. It was not required by law to spread on its record the evidence by which it ascertained that notice had been given. It did find and spread on its record that "notice had been given according to law." This was a fact in pais, to be established by evidence, and its power to proceed further in the case depended upon the giving or failure to give this notice. It judicially ascertained it was given, and we think that it is conclusive as against a collateral attack.

In *Daugherty v. Brown*, 91 Mo. 26, 3 S. W. 210, a case in all respects similar to this, this court held a recital that "due legal notice had been given of the intended application" was sufficient, and affirmed the judgment of the circuit court, refusing to enjoin the overseers from opening the road. The decision in that case is well sustained by authority elsewhere. *Hendrick v. Whittemore*, 105 Mass. 23; *Borden v. State*, 11 Ark. 519, 44 Am. Dec. 217; *Delaney v. Gault*, 30 Pa. 63. \* \* \*

<sup>13</sup> Rev. St. 1889, § 7797, provides that notice of an intended application for a new road or change of road "shall be given by printed or written handbills put up in three or more public places in such municipal township or townships, one of which to be put up at the proposed beginning, and one at the proposed termination, of said road, at least twenty days before the first day of a regular term of the county court at which the petition is presented, and which notice shall apply and be binding on corporations as well as on persons."



## SECTION 23.—STATUTORY PRESUMPTION OF REGULARITY

## VILLAGE OF BELLWOOD v. GALT et al.

Supreme Court of Illinois, 1926. 321 Ill. 504, 152 N. E. 591.

Petition by the Village of Bellwood for levy of a special assessment and ascertainment of just compensation, in which an assessment roll was filed, whereupon Arthur T. Galt and another filed objections. From a judgment overruling objections, fixing compensation, and confirming assessment roll, the objectors appeal. Reversed.

DUNN, J. The village of Bellwood filed a petition in the superior court of Cook county, pursuant to an ordinance passed by the president and board of trustees of the village, for the improvement of Twenty-Fifth avenue between the south line of Madison street extended and the north line of Marsh's subdivision, praying for the levying of a special assessment for the cost of the improvement and for the ascertainment of just compensation for the land to be taken or damaged by it. An assessment roll was filed assessing benefits against the property involved in the appeal in the sum of \$1,780 and awarding compensation in the sum of \$1,600 for the part of the property taken by the improvement. Arthur T. Galt and Ida C. Galt, the owners of the property, filed numerous objections, among which were the objections that the ordinance and the improvement were unreasonable; that the ordinance attached to the petition was not recommended by the board of local improvements; that no ordinance was submitted to the council by the board of local improvements; that the description of the proposed improvement was indefinite and uncertain; and that the elevation of the roadway could not be determined because the ordinance provided that the elevation should be the same as that of the existing sidewalk on the east side of the street, which did not extend the entire length of the roadway. The legal objections were all overruled. There was a hearing as to the benefits and damages before the court without a jury and a judgment fixing the compensation for property taken at \$2,000, finding that the property not taken would not be damaged and confirming the assessment roll, from which the objectors have appealed.

Several of the assignments of error have been argued by the appellants with much force, but we shall only consider one, which is fatal to the whole proceeding: That the ordinance was not submitted to the council, and was not recommended by the board of local improvements.

Section 5 of the Local Improvement Act (Smith-Hurd Rev. St. 1925, c. 24, § 702) provides that no ordinance for any local improvement, to be paid wholly or in part by special assessment or special tax-

ation, shall be considered or passed by the city council or board of trustees of any city, village, or town, unless the same shall first be recommended by the board of local improvements. Section 7 (section 705) provides that all such ordinances shall originate with the board of local improvements, which shall adopt a resolution describing the improvement and fixing a day and hour for the public consideration of such resolution, cause an estimate to be made of the cost of the improvement, which must be made a part of the record of the resolution, and give notice of the time and place of a public hearing, and, if "upon such hearing the board shall deem such improvement desirable, it shall adopt a resolution therefor and prepare and submit an ordinance therefor as hereinafter provided." Section 8 (section 706) provides that at the public hearing, in case any person shall appear to object to the proposed improvement or any of the elements thereof, the board shall adopt a new resolution abandoning the proposed scheme, or adhering thereto, or modifying the extent, nature, kind, character, and estimated cost, and, if the proposed improvement be not abandoned, shall cause an ordinance to be prepared therefor to be submitted to the council or board of trustees, prescribing the nature, character, locality, and description of the improvement, and providing whether the same shall be made wholly or in part by special assessment or special taxation on contiguous property. Section 9 (section 707) provides with any such ordinance presented by the board of local improvements to the city council or board of trustees shall be presented also a recommendation of such improvement by the board, signed by at least a majority of the members thereof, which shall be prima facie evidence that all the preliminary requirements of the law have been complied with, and, if a variance be shown on the proceedings in the court, it shall not affect the validity of the proceedings, unless the court shall deem the same willful or substantial.

These sections impose upon the board of local improvements responsibility for the initiation of all local improvements to be paid for wholly or in part by special assessment or special taxation and the duty of compliance with all the provisions of the act as conditions precedent to any action of the city council or the board of trustees of a village. In the absence of a resolution, an estimate of cost, an ordinance prepared by the board prescribing the nature, locality, and description of the improvement, and providing whether the same shall be made wholly or in part by special assessment or special taxation on contiguous property, and presented to the council or board of trustees, together with a recommendation of the improvement signed by a majority of the members of the board of local improvements, the board of trustees of the appellee was without authority to pass the ordinance for this improvement. Attached to the petition is a copy of the ordinance, as required by section 14 of the Local Improvement Act (Smith-Hurd Rev. St. 1925, c. 24, § 712), together with copies of the estimate and a recommendation of the improvements signed by a majority of the mem-

bers of the board of local improvements. This recommendation is declared by the act to be prima facie evidence of a full compliance with all the requirements of the law. The village was therefore under no obligation, in the first instance, to introduce any evidence of a compliance with the preliminary provisions of the act, but, when evidence was introduced in support of the objection that the board of local improvements had not prepared or recommended the ordinance, the prima facie case no longer prevailed, and it then became necessary for the village to introduce evidence to show such compliance. The statute making the recommendation prima facie evidence of a compliance with the law merely established a rule of procedure changing the burden of proof. In the absence of this statute, the village would have been required, in the first instance, to assume the burden of producing proof that the ordinance had been prepared by the board of local improvements, and that the board had recommended the improvement to the board of trustees. The only effect of the statute making the certificate prima facie evidence is that such compliance shall be assumed until evidence to the contrary is introduced. *Chicago Terminal Transfer Railroad Co. v. City of Chicago*, 217 Ill. 343, 75 N. E. 499; *City of Rockford v. Mower*, 259 Ill. 604, 102 N. E. 1032; *City of Peoria v. Peoria Railway Co.*, 274 Ill. 48, 113 N. E. 170; *Village of Oak Park v. Hulbert*, 307 Ill. 270, 138 N. E. 678.

The board of local improvements is a body to which are committed, not only the initiation of all public improvements to be made by special assessment or special taxation, but also important duties in regard to the making of contracts for the construction of such improvements and the performance of such contracts. Official action of such a body can be taken only by a majority of its members meeting together and acting officially. *People v. Chicago & Eastern Illinois Railway Co.*, 306 Ill. 402, 138 N. E. 127; *McKeown v. Moore*, 303 Ill. 448, 135 N. E. 747; *McManus v. McDonough*, 107 Ill. 95. When a record of its proceedings is required to be kept, the record is the only lawful evidence of its action, and it cannot be contradicted, or added to by parol. *People v. Madison County*, 125 Ill. 334, 17 N. E. 802; *People v. Smith*, 149 Ill. 549, 36 N. E. 971; *People v. Carr*, 231 Ill. 502, 83 N. E. 269; *People v. Warren*, 231 Ill. 518, 83 N. E. 271; *Southworth v. Board of Education*, 238 Ill. 190, 87 N. E. 403; *City of Belleville v. Miller*, 257 Ill. 244, 100 N. E. 946; *People v. Toledo, St. Louis & Western Railroad Co.*, 270 Ill. 472, 110 N. E. 723; *People v. Hartquist*, 311 Ill. 127, 142 N. E. 475.

The statute requires the board of local improvements, in section 7, to prepare and submit an ordinance, and in section 8 to cause to be prepared an ordinance to be submitted to the council or board of trustees, as the case may be. It is not required that the board should by one of its own members perform the physical work of writing the ordinance, but the act of preparing it is an official act of the board, which requires a meeting of at least a majority of the members, at which there



may be a consideration of the ordinance and a conclusion arrived at in regard to the recommendation of the improvement. The board of local improvements is required to keep a record of its proceedings, and such record cannot be contradicted, added to, or supplemented by parol. *City of Belleville v. Miller*, supra. The act of preparing and submitting the ordinance with a recommendation of the improvement, like the official action of any body of individuals transacting public business, requires the official assent of a majority of the members at a meeting of the board, and this can be shown only by the record.

The first resolution of the board, including the estimate of the cost, and the second resolution, were introduced in evidence, and it was stipulated by the attorney for the appellants "that there was no further action taken and entered in the journal of the board of local improvements with reference to this improvement by the board after the adoption of the second resolution." A record which is the only source of evidence by which official action can be shown, which does not show any action, shows that none was taken. The act of the individual members of the board is not the act of the board. The recommendation signed by the majority of the board of local improvements is not evidence of the fact that the recommendation was approved or ordered by the board at an official meeting, and does not identify the ordinance as one approved or considered by the board. Such a recommendation may never have been approved by the board, but may have been carried about and the signatures procured separately and independently, without any official action whatever. The recommendation served its purpose under the rule of procedure fixed by the statute of showing a prima facie case, but it is not of itself evidence, and, when evidence is introduced to the contrary, it has no effect to overcome such evidence.

For the want of compliance with the requirements of the statute by the board of local improvements, as shown by its record, the board of trustees of the village was without authority to pass the ordinance for the improvement, and the superior court should have dismissed the petition.

The judgment is reversed.

Judgment reversed.

## SECTION 24.—REFERENCE TO HEARING OR FINDING

## In re GROSS' LICENSE.

Supreme Court of Pennsylvania, 1894. 161 Pa. 344, 29 A. 25.

Appeal from court of quarter sessions, Luzerne county.

Application by Herman Gross for wholesale liquor license. From a decree refusing it, applicant appeals. Affirmed.

DEAN, J. This is the decree from which is brought this appeal: "Now March 1, 1894, after hearing, sureties on the within bond are approved, and the license, as prayed for, is refused." Counsel for appellant, to sustain his appeal, argues that as there was no denial of the necessity for the license, and no allegation that the applicant was not a fit person, and as it appeared from the decree the bond and sureties were approved, the inference necessarily is that the refusal was not the exercise of discretion, but the result of arbitrary will.

Such inference is not warranted by the facts. The sixth section of the act of June 9, 1891 (P. L. 259), providing for licenses to wholesale dealers in liquors, says: "The court of quarter sessions shall hear petitions from residents of the county, in addition to that of the applicant, in favor of and remonstrance against the application for such license, and in all cases shall refuse the same whenever, in the opinion of said court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public, or that the applicant or applicants is or are not fit persons to whom such licenses should be granted." This section must be read in connection with the second of the same act, which directs the court to fix, by rule or standing order, a time at which all applications for and objections to licenses shall be heard by evidence, petition, remonstrance, or counsel. The two sections enjoin upon the court the duty of hearing and considering. If there be nothing on the records of the court but the averments in the petition, these, at the time fixed, must be heard and considered. The court may hear oral testimony or the arguments of counsel on either side. It may, of its own knowledge of the unfitness of the applicant, or of his failure in other material particulars to meet the requirements of the law, refuse the application, just as it may, of its own knowledge, approve, for sufficiency, or reject, for insufficiency, the sureties on the bond. The exercise of judicial discretion by the court is commanded by the statute. This being so, how far this court will go in reviewing the decrees of the quarter sessions, notwithstanding repeated decisions, seems still to be in doubt. Therefore, we again say:

1. The discretion must be exercised in a lawful manner. The applicant has a right to be heard, and so have objectors. A decree without

hearing, or opportunity for hearing, at a time fixed by rule or standing order, as the law directs, would be manifestly illegal and on certiorari, would be set aside.

2. If the court has, in a lawful manner, performed the duty imposed upon it, it is not our business to inquire whether it has made a mistake in its conclusions of fact. Whether the same facts induce in our minds the same belief as in that of the court below, as to the character of the applicant, or other material averments, is wholly immaterial. It is the discretion of the court of quarter sessions, not ours, that the law requires.

3. A decree made arbitrarily, or in violation of law, it is our plain duty to set aside. For example, if a judge should refuse a license because, in his opinion, the law authorizing licenses is a bad law, or if he should grant all licenses because he believed the law wrong, as tending to confer a privilege on a special few, in either case there would be no exercise of judicial discretion. Both would be the mere despotic assertion of arbitrary will by one in power,—that sort of lawlessness which is least excusable, and excites most indignation.

4. If the record shows the decree was had after hearing at a time fixed by rule or standing order, the presumption is that the decree is judicial, and not arbitrary; and this presumption is not rebutted by an argument from evidence that the court ought to have reached a different conclusion. In the case before us the record shows the license was refused after hearing. The act is an official one, performed by a public officer in the exercise of the functions of his office. The presumption, in all such cases, is that the officer performed his duty according to law. He is not bound to set out legal reasons for his action. He is only bound to have them.

In *Re Johnson's Appeal*, 156 Pa. 322, 26 A. 1066, relied on by appellant, the decree showed no hearing, nor did the record anywhere indicate that the decree was founded on a hearing, or that any opportunity to be heard had been afforded the applicant. The decree was reversed, and the case sent back, that it might be heard and decided as the law directs. While, in these cases, the justices of the quarter sessions do not always set out on the record the reasons for their decrees, it is going very far to assume from that fact alone, as is done in the argument of this case, that they are made without lawful reasons. We can comprehend how a man's conscience may condemn as wrong a law of the land. But that sort of a conscience, so tender as to withhold approval of a law, yet which voluntarily takes an oath to administer it according to its true intent and meaning, and then deliberately violates it, is beyond our comprehension. We will not assume, without incontrovertible evidence, of record, that there is such an one.

The decree is affirmed, and the appeal is dismissed, at cost of appellant.



## MAHLER v. EBY.

Supreme Court of the United States, 1924. 264 U. S. 32, 44 S. Ct. 283, 68 L. Ed. 549.

Pending the imprisonment of appellants, the Secretary of Labor issued warrants for arrest of the appellants under the Act of May 10, 1920, c. 174, 41 Stat. 593 (Comp. St. Ann. Supp. 1923, §§ 4289¼b [4] to 4289¼b [6]).

They were all in the same form. That as to Mahler was as follows:

“Warrant of Arrest No. 54616/151.

“United States of America, U. S. Department of Labor, Washington.

“To Harry R. Landis, Inspector in Charge, Chicago, Illinois:

“Whereas, from evidence submitted to me, it appears that the alien, Herbert Mahler, who landed unknown at the port of Seattle, Wash., on or about the 1st day of April, 1913, has been found in the United States in violation of the act of May 10, 1920, for the following among other reasons:

“That he is an alien who since August 1, 1914, has been convicted of a violation of or a conspiracy to violate an act entitled ‘An act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,’ approved June 15, 1917, or the amendment thereof, approved May 16, 1918, the judgment on such conviction having become final, and that he is an alien who since August 1, 1914, has been convicted of a violation of or a conspiracy to violate an act, ‘An act to authorize the President to increase temporarily the military establishment of the United States,’ approved May 18, 1917, or any amendment thereof or supplement thereto; the judgment on such conviction having become final:

“I, Theodore G. Risley, Acting Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law,” etc.

On June 14 and 15, 1921, each appellant had a hearing before Immigrant Inspector Paul at Leavenworth, at which appellants were examined orally, and the indictment, the judgments, and the opinion and judgment of the Circuit Court of Appeals were introduced in evidence. The Secretary of Labor, on the records thus made and presented to him, issued a warrant of deportation of each appellant in all respects, *mutatis mutandis*, like that in the case of Herbert Mahler, as follows:

"To Commissioner of Immigration, Montreal, Canada, or to Any Officer or Employee of the U. S. Immigration Service:

"Whereas, from proofs submitted to me, after due hearing before Immigrant Inspector C. H. Paul, held at Leavenworth, Kansas, I have become satisfied that the alien, Herbert Mahler, who landed at the port of Seattle, Washington, on or about the 1st day of September, 1913, has been found in the United States in violation of the Act of May 10, 1920; that he is an alien who since August 1, 1914, has been convicted of a violation of or a conspiracy to violate an act entitled 'An act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,' approved June 15, 1917, or the amendment thereof approved May 16, 1918, the judgment on such conviction having become final; that he is an alien who since August 1, 1914, has been convicted of a violation of or a conspiracy to violate an act entitled 'An act to authorize the President to increase temporarily the military establishment of the United States, approved May 18, 1917, or any amendment thereof or supplement thereto, the judgment on such conviction having become final:

"I, E. J. Henning, Assistant Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return said alien to Canada the country whence he came, at the expense of the appropriation, 'Expenses of Regulating Immigration, 1922.'

"For so doing this shall be your sufficient warrant.

"Witness my hand and seal this 10th day of November, 1921.

"[Signed] E. J. Henning,

"Assistant Secretary of Labor."

The Act of Congress enacted May 10, 1920 (chapter 174, 41 Stat. 593) provides that aliens of certain classes described in the act, in addition to those for whose expulsion authority already exists, shall, upon the warrant of the Secretary of Labor, be taken into his custody and deported in the manner provided in sections 19 and 20 of the Immigration Act of February 5, 1917 (39 Stat. p. 889 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 4289<sup>1</sup>/<sub>4</sub>jj, 4289<sup>1</sup>/<sub>4</sub>k]), "if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States." The classes include all aliens interned as enemies by the President's proclamation under R. S. § 4067 (Comp. St. § 7615) and alien convicts under the Espionage Act, the Explosives Act, the act restricting foreign travel, the Sabotage Act, the Selective Draft Act, the act punishing threats against the President, the Trading with the Enemy Act, and certain sections of the Penal Code. Section 2 makes the decision of the Secretary of Labor in ordering expulsion of an alien under the act final. \* \* \*

TAFT, Chief Justice. \* \* \* There is no authority given to the Secretary to deport, except upon his finding after a hearing that the petitioners were undesirable residents. There is no evidence that he made such a finding, except what is found in the warrant of deportation. The warrants recite that upon the evidence the Secretary has become satisfied that the petitioner aliens have been found in the United States in violation of the Act of May 10, 1920, and that they were finally convicted of the offenses named in the act. They could not have been found in the United States in violation of the act of 1920 until after the Secretary had found that they were undesirable residents. Appellees' argument is that, therefore, this must be taken to mean that he finds them undesirable citizens. But the words "have been found" naturally refer to a time when the warrant of arrest was served on them, and before he had them before him. They exclude a possible meaning that he was then making their stay in the country illegal by implication of a finding that they were undesirable. This conclusion is borne out by the language of the Secretary in the warrant of arrest, which before the hearings he issued against the petitioners, and in which he directed their arrest on the ground that they had been found in the United States in violation of the Act of May 10, 1920. It would clearly appear from these two documents, which are naturally to be construed in *pari materia*, that the Secretary did not deem his finding that the petitioners were undesirable citizens essential to enable him to deport them. Indeed, he seems to have used forms applicable to aliens of a fixed excluded class, to be deported on identification with the class, without any further finding by him. The natural construction of his language is that he has become satisfied that they are in the country in violation of the act solely because they have been convicted as stated.

Does this omission invalidate the warrant? The finding is made a condition precedent to deportation by the statute. It is essential that, where an executive is exercising delegated legislative power he should substantially comply with all the statutory requirements in its exercise, and that, if his making a finding is a condition precedent to this act, the fulfillment of that condition should appear in the record of the act. In *Wichita R. R. & Light Co. v. Public Utilities Commission*, 260 U. S. 48, 43 S. Ct. 51, 67 L. Ed. 124, a statute of a state required that a Public Utility Commission should find existing rates to be unreasonable before reducing them, but there was no specific requirement that the order should contain the finding. We held that the order in that case, made after a hearing and ordering a reduction, was void for lack of the express finding in the order. We put this conclusion, not only on the language of the statute, but also on general principles of constitutional government. After pointing out the necessity for such delegation of certain legislative power to executive agencies we said (page 59 [43 S. Ct. 55]):

"In creating such an administrative agency the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon



it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.

"It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the commission. We cannot agree to this."

If the principle thus stated is to be consistently adhered to, it is difficult in any view to give validity to the warrants of deportation before us.

It is said that no exception was taken to the warrant on this account until the filing of the brief of counsel in this court. There was an averment that the warrant was void without definite reasons in the petition of habeas corpus. There was nothing of the kind in the assignment of error. But we may under our rules notice a plain and serious error though unassigned. Rule 21, § 4, and rule 35, § 1, 222 U. S. appendix, pp. 27, 37; *Wiborg v. United States*, 163 U. S. 632, 658, 16 S. Ct. 1127, 1197, 41 L. Ed. 289; *Clyatt v. United States*, 197 U. S. 207, 221, 222, 25 S. Ct. 429, 49 L. Ed. 726; *Crawford v. United States*, 212 U. S. 183, 194, 29 S. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392; *Weems v. United States*, 217 U. S. 349, 362, 30 S. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705. The character of the defect is such that we cannot relieve ourselves from its consideration. The warrant lacks the finding required by the statute, and such a fundamental defect we should notice. It goes to the existence of the power on which the proceeding rests. It is suggested that, if the objection had been made earlier, it might have been quickly remedied. There was no chance for objection afforded the petitioners until, after the warrant issued, in the petition for habeas corpus. The defect may still be remedied on the objection made in this court.

We need not discharge the petitioners at once because of the defective warrant. By section 761 of the Revised Statutes (Comp. St. § 1289) the duty of the court or judge in habeas corpus proceedings is prescribed as follows: "The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

Under this section, this court has often delayed the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that defects which render discharge necessary may be corrected. In *re Bonner*, Petitioner, 151 U. S. 242, 261, 14 S. Ct. 323, 38 L. Ed. 149; *Medley*, Petitioner, 134 U. S. 160, 174, 10 S. Ct. 384, 33 L. Ed. 835; *Coleman*

v. Tennessee, 97 U. S. 509, 24 L. Ed. 1118; United States v. McBratney, 104 U. S. 621, 624, 26 L. Ed. 869; Bryant v. United States, 214 F. 51, 53, 130 C. C. A. 491. The same rule should be applied in habeas corpus proceedings to test the legality of confinement under the decision of an administrative tribunal like the Secretary of Labor in deportation cases. No time limitation is imposed upon proceedings under the Act of May 10, 1920. If upon the evidence the Secretary finds that these petitioners are undesirable residents and issues warrants of deportation reciting that finding with the other jurisdictional facts, there will then be no reason, so far as this record discloses, why they should not be deported.

Accordingly the judgment of the District Court is reversed with directions not to discharge the petitioners until the Secretary of Labor shall have reasonable time in which to correct and perfect his finding on the evidence produced at the original hearing, if he finds it adequate, or to initiate another proceeding against them.

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## SECTION 25.—CORRECTION OF RECORD

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DU PAGE COUNTY v. MARTIN et al., Highway Commissioners.

Supreme Court of Illinois, 1892. 142 Ill. 607, 32 N. E. 269.

BAKER, J. This was mandamus, brought by appellees, the commissioners of highways of the town of Winfield, to compel the board of supervisors of the county of Du Page to appropriate from the county treasury the sum of \$1,081.60; the sum being one half the expense of constructing a bridge and its approaches across the Du Page river, on a public road, at Gary's Mills, in said town. The petition for the mandamus was based on the provision of section 19 of the act in regard to roads and bridges in counties under township organization, approved June 23, 1883, and in force July 1, 1883. Laws 1883, pp. 142, 143, (Rev. St. 1891, c. 121, § 19). It seems that on or about the 8th day of February, 1887, the bridge that had theretofore spanned the river at Gary's Mills was washed away by high water; that on the 8th day of March, 1887, the commissioners of highways of the town of Winfield filed with the county clerk a petition addressed to the county board, and asking for county aid in the rebuilding of the bridge; that on July 11, 1887, the board of supervisors refused such aid; that on July 25, 1887, said commissioners of highways filed with the county clerk a supplemental petition, again asking the county to aid in the rebuilding of said bridge; and that on September 13, 1887, the board of supervisors again refused to grant aid, and thereupon this petition for a writ of mandamus was filed in the circuit court of said Du Page county. The averments of said

petition stated a case within the provisions of the section of the statute referred to above, and the county of Du Page, appellant herein, interposed an answer, which traversed all the material allegations of such petition. A jury was waived, and the issues joined between the parties were submitted to the court. The court found such issues in favor of appellees, and rendered a final judgment against appellant, and awarded a peremptory writ of mandamus, commanding the appropriation from the county treasury of said sum of \$1,081.60. The judgment so rendered was afterwards affirmed in the appellate court of the second district.

One of the assignments of error here made is that the appellate court erred in not reversing the judgment of the circuit court because of the refusal of the latter court to admit proper evidence offered by appellant. We are unable to find either in the abstract or in the record that appellant made any offer to introduce any testimony whatever that was denied by the court, and in the briefs and arguments our attention is not called to any such refusal. We therefore conclude that this assignment of error was inadvertently made.

Another of the assignments of error is that the appellate court erred in not reversing the judgment because of the admission by the circuit court of improper evidence on behalf of the petitioners over the objections of appellant. From the briefs and arguments that are filed we understand that this assignment of error has reference to the admission in evidence of the record of a meeting of the commissioners of highways of the town of Winfield, held on the 16th day of September, 1889, and of an amended record of a meeting of said commissioners held on the 1st day of March, 1887. Section 10 of the act of June 23, 1883, (Rev. St. 1891, c. 121, § 10,) provides that the town clerk shall be ex officio clerk of the board of highway commissioners, and shall keep a record of all the official acts and proceedings of the board in a well-bound book, to be provided for that purpose; and the two records now in question were contained in and read from a book which was identified as the record book of the commissioners of highways of the town of Winfield. Said two records were offered and introduced in evidence together, counsel for the highway commissioners stating at the time that the amendment in the record of the proceedings of the meeting of March 1, 1887, was inserted pursuant to the vote of said commissioners at the meeting of September 16, 1889, to correct the record of said meeting of March 1st.

One of the two records so read in evidence was as follows: "At a meeting of the commissioners of highways of the town of Winfield, duly called, and held on the 16th day of September, A. D. 1889, C. D. Clark was appointed clerk pro tem., the clerk being absent from the county, and thereupon it was on motion duly and unanimously voted that the minutes and records of the previous meeting of the board be amended and corrected to correspond with the fact by inserting the following on page 398, before the record of the bridge contract: 'It being necessary to construct a new bridge across the Du Page river in said



town at Gary's Mills, so called, immediately, and a delay in so doing being detrimental to the public interest, and the cost of such new bridge being more than twenty cents on the one hundred dollars on the latest assessment of said town, and the levy of the road and bridge tax for this year being for the full amount of sixty cents on each \$100.00 allowed by law for the commissioners to raise, and the major part of which is needed for the ordinary repair of roads and bridges, unanimously voted that such bridge be immediately built, as provided by law, and that aid be asked of the county board, as provided by statute." And the other of said records was as follows: "At a meeting of the commissioners of highways held on the 1st day of March, A. D. 1887, at Gary's Mills bridge site, for the purpose of letting the contract of building a high-truss iron bridge over the Du Page river, there were present H. H. Martin, R. S. Chandler, and F. J. Hageman. It being necessary to construct a new bridge across the Du Page river, in said town, at Gary's Mills, so called, immediately, and a delay in so doing being detrimental to the public interest, and the cost of such new bridge being more than twenty cents on the one hundred dollars on the latest assessment of said town, and the levy of the road and bridge tax for this year being for the full amount of sixty cents on each \$100.00 allowed by law for the commissioners to raise, and the major part of which is needed for the ordinary repairs of roads and bridges, unanimously voted that such bridge be immediately built as provided by law, and that aid be asked of the county board, as provided by statute."

The record does not show that any objection, either general or specific, was made in the trial court to the introduction in evidence of these records, or either of them. If there was any valid objection to their admission, it must be considered that it was waived by appellant. We have so often held, in actions and proceedings at law, that, where no objection to the admission of testimony is made in the court below, an objection to it cannot be urged for the first time on appeal or error, that a citation of authority to that effect is deemed wholly unnecessary. We cannot assume that, if objection had been made, appellees would have been unable to satisfactorily show the amendment was made by or under the direction of the same town clerk who was in office when the meeting of March 1, 1887, was held, and whose duty it was to make a full and correct record of all the proceedings of said meeting, and made while he was still in office as such clerk, and therefore under the sanction of his oath of office, and perhaps even made from written memoranda or minutes made and kept by him; or, in the event such clerk was prevented by death or other necessity from perfecting the record, unable to show such amendment was made by order and direction of the same highway commissioners by whom the proceedings had at the first meeting were transacted, acting officially at a meeting of the board, and to supplement the record of such order and direction with evidence that justified the making of the same. It follows that appellant can take nothing by the

assignment of error under consideration, and for the reason that it has no sufficient basis in the facts of the trial as disclosed by the record.

It is claimed to be error that the appellate court did not reverse the finding and judgment of the circuit court on the ground that they were contrary to the law and the evidence in the case. It sufficiently disposes of this claim to say that, under the statute, the judgment of the appellate and circuit courts conclusively settles all questions of fact in favor of appellees, and that no questions of law were preserved at the trial by the submission of propositions in writing, to be held or refused by the court. *Bridge Co. v. Commissioners of Highways*, 101 Ill. 518; *Fitch v. Johnson*, 104 Ill. 111; *Edgerton v. Weaver*, 105 Ill. 43; *American Exch. Nat. Bank v. Chicago Nat. Bank*, 131 Ill. 547, 22 N. E. 487, and authorities there cited.

It is urged that it was error to award, upon the record as it stands, a peremptory writ of mandamus against the county. On July 11, 1887, the board of supervisors refused to grant the aid that was asked in the first petition of the highway commissioners; and on September 13th of that year, a supplemental petition having been presented, they again refused to aid in the construction of the bridge. As we have already seen, it was conceded by appellees in open court that the amendment of the record of the proceedings of the meeting of March 1, 1887, was not made until on or after September 16, 1889. And so it necessarily follows that at the time of the filing of each of the petitions for aid, and at both of the times that the board of supervisors refused to grant aid, there was on the records of the proceedings of the highway commissioners no record whatever of any action taken by the highway commissioners in conformity with the requirements of the statute granting aid. In *People v. Madison Co.*, 125 Ill. 334, 17 N. E. 802, it was held that the determination by the commissioners of highways that a necessity exists for the construction or repair of a bridge, which will serve as the basis of an application to the county board for county aid under the statute, is the exercise of a corporate power vested in the commissioners, which can only be exercised at a meeting of such commissioners, and can only be shown by the record of their proceedings required by the law to be made and kept. The question there at issue was whether or not parol evidence is admissible for the purpose of showing the official action of the highway commissioners in the premises, and it was held it was not. In discussing that question the court said: "Before the county board could be legally moved in the matter, or any legal duty be cast upon them, the commissioners must have determined that such necessity existed, and have preserved the evidence of that fact in their record. In the proceeding, then, before the circuit court, the corporation, the commissioners of highways, could only speak by their record, unaided by parol testimony."

In the proceeding at bar the commissioners spoke in the circuit court only by their record, but by that record as amended. By the language

above quoted from the opinion in the Madison County Case, it was not intended to intimate that upon the trial of the issues there joined, which are substantially like those here joined, an amended record of the proceedings of a board of highway commissioners would not be competent evidence. Where the official action which is the subject of a proposed amendment has in fact been had, but by reason of some accident or oversight, or for some other cause, has been omitted by the clerk from the record of the proceedings of the board, both reason and the authorities show that it is competent to amend the record to correspond with the fact, and that, when such amendment is made, the record, as amended, unless impeached, is conclusive. *Welles v. Battelle*, 11 Mass. 476; *Hartwell v. Littleton*, 13 Pick. 229; *Boston Turnpike Co. v. Town of Pomfret*, 20 Conn. 595; *Hutchinson v. Pratt*, 11 Vt. 402; *Mott v. Reynolds*, 27 Vt. 206; *Chamberlain v. Dover*, 13 Me. 466.

In the case at bar, it is conclusively shown by the amended record that, prior to the presentation of either of the petitions for county aid, the highway commissioners had officially determined that it was necessary to construct a new bridge immediately, and that a delay in so doing would be detrimental to the public interest; that the cost of such new bridge would be more than 20 cents on the \$100 on the latest assessment of the town; that the levy of the road and bridge tax for the year was for the full amount of 60 cents on each \$100 allowed by law for the commissioners to raise, and that the major part of this was needed for the ordinary repairs of roads and bridges; and that said commissioners had unanimously voted that such bridge should be immediately built as provided by law, and that aid should be asked of the county board as provided by statute. But it appears from the record in this cause that said official determinations, acts, and proceedings of the highway commissioners had not, at the time when the applications for aid were made and refused, been entered upon the record of the proceedings of said commissioners.

It is manifest from the record in this cause, taken as a whole, that the highway commissioners have a meritorious case, and that it is just and right that the county should pay one half the cost of the bridge and its approaches. Does the delay in recording the determinations, acts, and proceedings in question preclude appellees from having a peremptory writ of mandamus awarded to them in this suit? In our opinion, it should be held that it does not. In denying the first petition for aid the county board stated upon their records the grounds for such denial. The reasons given for refusing assistance were that the reasonable cost of the bridge would not exceed 20 cents on the \$100 of the last year's valuation; that the levy for road and bridge purposes in the town was less than 60 cents on the \$100; and that the major part of the 60 cents was not needed for ordinary repairs of roads and bridge. The reasons stated upon the record for denying the supplemental petition for aid were that no emergency existed justifying the construc-



tion of the bridge before applying to the county board for aid; that the contract price and amount expended for the bridge were more than was necessary for the purpose; and that the major part of the tax levies was not needed for ordinary repairs of roads and bridges. No claim was made by the board of supervisors either that the highway commissioners had not officially ascertained and determined the necessary statutory facts, or that their acts and determinations in that behalf had not been entered upon the record of their proceedings.

The case at bar is materially different from *People v. Madison Co.*, supra. Here the commissioners did in due time officially and as a board ascertain and determine the statutory facts essential to a right to call on the county for aid, and proved the same by introducing in evidence the record of their proceedings in that behalf. In the *Madison County Case*, on the contrary, no record evidence was produced to show that the three commissioners had ever taken official action, such as the statute required, and it was sought to show such action by oral testimony. The first sentence of the language quoted above from the opinion in that case is to be read in connection with the next succeeding sentence, and is to be considered in the light of the question then under examination,—the necessity of official action on the part of the commissioners, and of record evidence of such action. Here, we see no good reason why the amended record should not be held to speak as of the day when the proceedings which it records were in fact had. And, as appellant, in refusing the aid that was asked for, did not base its refusal on the ground that there had been no such proceedings, or on the ground that they had not been entered upon the records of the commissioners, we are unable to see that allowing the amended record so to speak works any injustice or hardship to appellant. We think that there was no error in awarding a peremptory mandamus.

The judgment of the appellate court is affirmed.<sup>15</sup>

<sup>15</sup> "The point most earnestly urged by counsel for appellant against the last amendment of the record is that the trustees had no power at the subsequent meeting to order the clerk to make the amendment. This point was decided adversely to appellant by the appellate court, citing the decision of this court in *Dupage Co. v. Commissioners of Highways*, 142 Ill. 607, 32 N. E. 269 (1892). That case we regard as in point, and sustaining the conclusion reached. While the objection that the trustees had no power to order the clerk to amend the record at a subsequent meeting goes both to the amendment of July 25th and that of April 27th, it is insisted that the latter amendment is not only unauthorized, by reason of the time at which it was made, but also upon the ground that there had been a change in the personnel of the board of trustees; only one of the three members of April 6, 1896, being in office April 27, 1897. We are unable to see upon what legal principle the change in the membership of the board could affect its power to direct its clerk to make amendments of this character. The authority of the board to make such an order, if it exists, does not depend upon the personal recollection of the individual members of the board, but upon the knowledge of the clerk, or such files, minutes, or memoranda which put him in possession of knowledge of what actually transpired. The statute makes it his duty to be present at all meetings of the board, and to record in a book to be provided for the purpose all their official proceedings, and it also makes him liable to a penalty for a failure to perform that duty. The resolution at the special meeting on April 27, 1897, was but a direction to him to per-

## STATUTORY PROVISION FOR CORRECTION OF RECORDS.

Revenue Act of Illinois, § 191 (Smith-Hurd's Rev. St. 1927, c. 120 § 179): "In all judicial proceedings of any kind, for the collection of taxes and special assessments, all amendments may be made which, by law, could be made in any personal action pending in such court, and no

form that duty; and presumably he knew what had been done, and, after the resolution of the board, did that which he should have done before. See *Du-page Co. v. Commissioners of Highways*, supra. In our view of the case, the legality of the amendment does not depend so much upon the resolution of the board of trustees as it does upon the presumption that the clerk was in possession of knowledge of the facts recited in the preamble of the resolution, and had failed to record them, and could have done so, in the discharge of his duty, as well before as after the passage of the resolution. We reach this conclusion the more readily because the jurisdictional fact as to presenting the petition to the board 'twenty days before the regular meeting in April,' and the delivery of a copy thereof, at least 10 days before the date at which the petition was to be considered, to the president or clerk of the board of directors of each district whose boundaries were to be changed if the petition was granted, were matters which must have appeared from the files in the proceeding. It has not been the rule in this court to exact of public officers of these quasi municipalities the highest degree of accuracy or formality in the discharge of their duties, for the reason that to do so would result in injury to the public. If it be said that here was an unreasonable lapse of time between the proceeding and the recording thereof, it may also be said that there was unnecessary delay in the attempt on the part of the petitioner to set aside the redistricting. We regard the opinion of the appellate court in this case as fully and fairly disposing of the substantial questions involved, and while, on the question last considered, the case of *City of Covington v. Ludlow*, 1 Metc. (Ky.) 295 (1858), seems to be an authority against the view herein expressed, we are not disposed to follow it." *Board of Education v. Trustees of Schools*, 174 Ill. 510, 512, 51 N. E. 656, 657 (1898).

"The rule that an amendment by a clerk must be by the person who held the office at the time the record was made and during his term of office does not apply to this case; for the reason that the amendment was the act of the board, and not of the clerk. A collective body having a clerk employed or authorized by law to keep its records has control of them, and may amend them at any time according to the fact, even if they have once been approved. Such a body may direct its clerk to make an amendment, and, when so acting under its direction, it is immaterial whether he was the individual filling the office at the time of the transaction recorded or not. The right to make such an amendment does not depend upon section 191 of the Revenue Act, but it is common to legislative bodies and collective bodies generally. *Turley v. County of Logan*, 17 Ill. 151 (1855); *Town of St. Charles v. O'Mailey*, 18 Ill. 407 (1857); *People v. Madison County*, 125 Ill. 334, 17 N. E. 802 (1888); *Ryder's Estate v. City of Alton*, 175 Ill. 94, 51 N. E. 821 (1898); *People v. Zellar*, 224 Ill. 408, 79 N. E. 697 (1906)." *People ex rel. v. Cleveland, C., C. & St. L. R. Co.*, 271 Ill. 195, page 200, 110 N. E. 1021, 1023 (1915).

"If the clerk makes an erroneous record, the town are not bound by it, merely because others confide in its correctness. They are notwithstanding entitled to have it set right. Otherwise they would be concluded, not only by their own votes, but by whatever by design or accident, might be improperly entered by the clerk, and that without any chance of relief by amendment. The plaintiffs made their contract with certain persons, assuming to be agents of the town. Their remedy is against the agents, if they acted without authority." *Chamberlain v. Inhabitants of Dover*, 13 Me. 466, 474 (1836).

But see *Bissell v. Jeffersonville*, 24 How. 287, 16 L. Ed. 664 (1860); *Sawyer v. Manchester & K. R. R. Co.*, 62 N. H. 135, 13 Am. St. Rep. 541 (1882); *Dillon, Municipal Corporations*, §§ 550-562.

assessment of property or charge for any of said taxes shall be considered illegal on account of any irregularity in the tax lists or assessment rolls, or on account of the assessment rolls or tax lists not having been made, completed or returned within the time required by law, or on account of the property having been charged or listed in the assessment or tax list without name, or in any other name than that of the rightful owner; and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof; and any irregularity or informality in the assessment rolls or tax lists, or in any of the proceedings connected with the assessment or levy of such taxes, or any omission or defective act of any officer or officers connected with the assessment or levying of such taxes, may be, in the discretion of the court, corrected, supplied and made to conform to law by the court, or by the person (in the presence of the court) from whose neglect or default the same was occasioned. [As amended by Act May 3, 1873]."<sup>16</sup>

<sup>16</sup> "In the town of Witt the record of the proceedings of the highway commissioners at the meeting of September 1, 1914, showed only that the highway commissioners' certificate of tax levy was certified to by the commissioners and filed with the county clerk. In the town of Irving the record showed that a tax levy was made out and signed by the commissioners and turned over to the supervisor. In the town of Grisham the record showed that the clerk was instructed to send a copy of the tax levy to the county clerk. There was in none of the meetings a determination of the amount necessary to be raised by taxation. In each case the appellant asked leave to amend the record, and offered to show by the clerk and the commissioners of highways that a levy of the amount named in the respective certificates was made by the highway commissioners for road and bridge purposes. The court sustained objections to the evidence. There was no offer to prove any fact or what the commissioners actually did. The offer was to prove that a levy was made. This was a conclusion of law, and the court properly sustained the objection. The records do not show a compliance with the statute, and the objection to the tax was properly sustained for this reason." *People ex rel. Kiggins v. Cleveland, C., C. & St. L. R. Co.*, 270 Ill. 527, 530, 110 N. E. 841, 842 (1915).

Same case, *Farmer, C. J.*, dissenting: "I think the county court erred in refusing to allow appellee to prove, in support of the motion for leave to amend the record, that in the towns of Witt, Irving, and Grisham the commissioners at their September meeting did determine the amount certified by them to the county board to be levied for road and bridge purposes. The opinion holds the objection of appellant to the offered proof was properly sustained because the offer was not to prove a fact but a conclusion. The purpose of the offer was to show the court, for its guidance in passing upon the motion for leave to amend the record, that the commissioners did, in fact, determine the amount certified to the county board at the meeting held the first Tuesday in September. It was an offer to prove a fact which, if established by the proof, made it the duty of the court to permit the record to be amended to speak the truth. The parol proof was not offered as evidence upon which the court was to determine finally whether the amounts had been determined upon as required by law, but as a basis for the amendment of the record. If the proof had been admitted and the record amended, then the amended record would have been required to be introduced in evidence to prove the facts. In my judgment the proof offered was proper, and I cannot see how it could have been properly made in any other way for the purpose for which it was made. The statute authorized the amendment of the record to speak the truth, and this court has held in opinions



## SECTION 26.—EVIDENCE OF OFFICIAL CHARACTER

## JOHNSON v. STEDMAN.

Supreme Court of Ohio, 1827. 3 Ohio, 94.

This cause came up on a motion for a new trial, adjourned here from the county of Meigs. It was an action of trespass for taking and converting goods. The defendant pleaded that he was a constable, and that an execution was put into his hands to be levied, by virtue of which he took the goods in question as the property of the defendant in execution, the now plaintiff. Upon this plea issue was joined. At the trial the defendant, to establish the fact that he was a constable, offered parol evidence, and no other, that he acted and officiated as constable of the township at the time the levy was made. The plaintiff objected to the admission of this evidence, but the court received it, and a verdict passed for the defendant. A motion was made for a new trial, upon the ground that improper testimony was admitted; maintaining that the actual appointment in writing, and other requisites, should be produced in evidence.

HITCHCOCK, J. The question now presented to the court was considered at the last term, in the case of Barret v. Reed, 2 Ohio, 409, but, inasmuch as there was some difference of opinion, and that case was decided upon a different point, was left undetermined.

But one serious objection is made to the admissibility of the evidence received on the trial of the issue in this case. It is this: That if such testimony is received, the rule "that the best evidence which the nature of the thing admits, and is capable of, must always be given," will be violated. \* \* \*

Constables in Ohio are township officers, although in some few instances they may serve process in any part of the county. They are elected by the people at their annual township elections, and any person elected and refusing to serve is subject to a penalty. Within ten days after the election, the individual elected is to take an oath of office, which oath may be administered by the township clerk, or any other person having general authority to administer oaths. In addition to this, before entering on the duties of his office, he must give a bond with one or more sureties, to be approved of by the trustees of the township, for a sum not exceeding two thousand dollars, payable to the state of Ohio, conditioned for the faithful discharge of those duties. The election, the giving of bonds, the approval of the sureties, the administration of the oath of office, ought to be noted by the township clerk in his book of record. This would undoubtedly

filed at this term and in previous cases, that it is competent to make proof in the manner offered in this case for the purpose of amending the record. Upon this question the opinion of the court, as I understand it, is in conflict with other decisions and with sound legal principles."

be done should the clerk, and every other officer concerned, do their duty. The constable, however, receives no certificate or other written document to prove his official character and qualifications. The best evidence "the nature of the thing admits of" to prove this official character would undoubtedly be the township records, provided these records had been properly kept. Experience, however, teaches us that in many parts of the country these records are so loosely kept that we are, from necessity, compelled to resort to evidence of a secondary nature.

Under these circumstances, does either policy, justice, or law dictate that, in cases like the present, we should strictly adhere to the rule that the best evidence which the nature of the thing admits of and is capable of shall be given? So far as it respects third persons, there is no doubt on the subject. Where such persons are interested, it is believed to be the practice of all courts to permit them to prove that an individual who claims to be a public officer is such *de facto*, without requiring them to prove that he is such *de jure*. The great danger which will result from adopting the same rule of evidence, where the officer himself is a party, is not readily conceived. There is a difference, it is true, between the two cases. Every man who undertakes to exercise the duties of an office ought to know whether he is legally qualified, while this knowledge cannot be supposed to extend to others. This difference of circumstances, however, is not so great as to require a difference in the rule of evidence.

In deciding this question, it may not be improper to turn our attention for a moment to the nature of those suits in which constables or other ministerial officers are parties. In some cases the principal question is whether the party is, or is not, an officer *de jure*. But such cases are not of frequent occurrence. Were it otherwise, it might be expedient to adopt a different rule of evidence. It is believed, however, that in ninety-nine cases in a hundred this is a question of secondary importance. The object more generally is to determine the right of property, the legality of process, the validity of an arrest, or something of a similar nature. In most of these cases, to require of the party, claiming to be a public officer, proof that he had complied with every requisite of the law to qualify him to act, would be attended with unreasonable inconvenience to him, without any commensurate advantage to his opponent.

In the case before the court, the real question in dispute was not whether Stedman was a constable, but whether the house which was the subject-matter of litigation was the property of Johnson, the plaintiff, or the property of Hollingsworth. Under these circumstances, the evidence was properly received. It was sufficient for the purposes of this case to prove that Stedman was a constable *de facto*.

The principle here decided is supported by high and unquestionable authority. In the case of *Potter v. Luther*, 3 Johns. 431, the Supreme Court of the state of New York say: "It is a general rule to

admit proof by reputation that a person acts as a general public officer or deputy." In *Berryman v. Wise*, 4 Term, 336, the Court of King's Bench, in England, decided that in the case of all peace officers, justices of the peace, constables, etc., it was sufficient to prove that they acted in these characters, without producing their appointment. This, to be sure, was the expression of Justice Buller; but, from an examination of the case, I am satisfied it was the opinion of the whole court. So in *Esp. Dig.* 783, it is laid down that cases similar to the one under consideration are exceptions to the general rule "that the best evidence, etc., must always be given."

Upon the whole, we are of opinion that the motion for a new trial must be overruled and judgment entered on the verdict.

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### ELDRED v. SEXTON.

Supreme Court of Ohio, 1831. 5 Ohio, 215.

Action of trespass against the treasurer of a school district for taking and converting a yoke of oxen, which were seized for nonpayment of a tax.

PER CURIAM. The question raised in the case seems to have been settled by this court, in the case of *Johnson v. Stedman*, 3 Ohio, 94. In that case it was decided that a person, who has justified an act upon the ground that he was a constable, might establish his official character by general reputation and proof that he acted as such. We are not disposed to change the principle established in that case. In fact, we are satisfied that it is more consistent with the ends of justice than to establish a contrary rule of evidence. We do not say that such evidence is conclusive; but that it is *prima facie*, and, unless contradicted, must be conclusive.<sup>17</sup>

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### McCOY v. CURTICE.

Supreme Court of Judicature of New York, 1832. 9 Wend. 17, 24 Am. Dec. 113.

Error from the Orange common pleas.

McCoy sued Curtice in an action of trover for a watch. The defendant pleaded the general issue. The plaintiff proved the taking of the watch and its value. The defendant justified as collector of a school district, viz., school district No. 15, situate partly in the town of Warwick and partly in the town of Goshen, in the county of Orange. He produced a warrant, signed by S. Jayne and J. Fox, as trustees of

<sup>17</sup> See *Case v. Hall*, 21 Ill. 632 (1859), defendant desiring to justify as officer must allege that he has been duly elected and has qualified; *Rounds v. Mansfield*, 38 Me. 586 (1854), must prove that he has qualified.



the school district, commanding certain moneys to be levied as a tax, and amongst others of McCoy, and proved by parol that Jayne and Fox were reputed to be, and acted as, trustees of the district, and also proved by parol that he, the defendant, had acted as collector, and that as such collector he had levied upon the watch of the plaintiff. The plaintiff objected to the parol evidence when offered, but the objection was overruled. He also objected to the warrant being received in evidence, until the erection of the district was shown by the production of the records of the towns of Warwick and Goshen, and insisted that, even were they produced, the warrant was illegal in having been issued by only two instead of three trustees. These objections were also overruled. The jury, under the charge of the court, found a verdict for the defendant, and the plaintiff sued out a writ of error.

SUTHERLAND, J. It is a general rule in relation to all public officers that they may establish their official character by proving that they are generally reputed to be, and have acted as, such officers, without producing their commission or other evidence of their appointment. This is well established, as to all peace officers, sheriffs, constables, justices of the peace, etc. 4 T. R. 366; *Potter v. Luther*, 3 Johns. 431; *Cowen's Tr.* 572, note "m"; *Young v. Commonwealth*, 6 Bin. (Pa.) 88; *Fowler v. Bebee*, 9 Mass. 231, 6 Am. Dec. 62; *People v. Collins*, 7 Johns. 549; *McInstry v. Tanner*, 9 Johns. 135; *Reed v. Gillet*, 12 Johns. 296; *Wilcox v. Smith*, 5 Wend. 231, 21 Am. Dec. 213; 16 Viner, 113, 14.

In *Rex v. Jones*, 2 Campb. 131, a letter was permitted to be read purporting to be from the lords commissioners of the treasury, without any evidence except what appeared on the face of the letter that they were commissioners. That, too, was a criminal case, and it was distinctly objected on the part of the defendant that the authority of the commissioners should be shown by producing the commission by which they were appointed. The trustees and collector of a school district are regular officers, annually chosen, with powers and duties well defined and regulated by statute; and it is not perceived why their official characters may not be shown in the same manner as that of a justice of the peace or a constable. They are officers of almost equal notoriety, and the duties of a collector are very much of the same nature, as those of a constable. Laws 1819, p. 198, §§ 20 to 25.

I am inclined to think, therefore, the parol evidence upon these points was admissible. Whether it was sufficient or not is a question which does not arise on this bill of exceptions. The objections are specifically to the nature of the evidence, and not to its defect or sufficiency. \* \* \*

Judgment affirmed.<sup>18</sup>

<sup>18</sup> For rest of opinion, see *ante*, p. 292.  
Accord: *Ross v. Helm*, [1913] 3 K. B. 462.

## PATTERSON v. MILLER.

Court of Appeals of Kentucky, 1859. 2 Metc. 493.

Chief Justice SIMPSON delivered the opinion of the court.

This action was brought by William F. Patterson against James P. Miller and William H. Haynes, to recover damages for an alleged illegal seizure and sale by them of his personal property. The plaintiff stated in his petition that the defendant Miller pretending to be the sheriff of Russell county, when in reality he was not the constitutional sheriff of that county, unlawfully and without authority took into his possession and sold a sorrel mare, the property of the plaintiff, and that the defendant Haynes purchased said mare at the aforesaid illegal sale and converted her to his own use.

The defendant Miller averred in his answer that he was the sheriff of Russell county, duly elected and qualified according to law, and as such seized the property in the petition mentioned, and made sale thereof, under and by virtue of two executions which issued from the office of the presiding judge of the Russell county court, and were placed in his hands for collection; and the defendant Haynes, in his answer, admitted that he had purchased the property so sold, and insisted that he had a right to make the purchase, as the property was sold under execution by a person who was acting as sheriff of the county.

The defendant Miller read as evidence upon the trial the certificate of his election as the sheriff of Russell county, and the records of the county court, by which it appeared that he had qualified and executed an official bond as sheriff, according to law. The plaintiff then offered to prove that Miller was not a resident of Russell county at the time he was elected, but was then, and still was, a resident of Adair county. This testimony was rejected by the court on the ground that the certificate of the examining board was conclusive evidence, not only of Miller's election as sheriff, but also of his eligibility to the office. The court, however, decided that evidence might be offered to show that he had removed from the county since his election, although evidence that he was not a resident of the county at the time of his election was inadmissible. The correctness of this decision of the court below is the only question presented for our consideration.

By the sixth article of the Constitution it is provided that no person shall be eligible to the office of sheriff who has not resided one year next preceding the election in the county for which he is a candidate. \* \* \* Whether the acts of a sheriff, who has forfeited his office by a removal from the county, would be valid, and could be relied on for his own protection, until his office should, by a direct proceeding against him, be declared vacant, it was not necessary now to determine. Such acts would, however, according to well-settled principles, be legal and valid, so far as third parties were concerned.

But where a person is constitutionally ineligible to an office, he will

not be the lawful incumbent thereof, although he may be elected, obtain a certificate of his election from the examining board, take the oath of office, and execute the bond prescribed by law. Are the acts of the officer in such a case legal to any extent; and, if so, to what extent are they legal?

As he holds his office by color of right, and acts as sheriff, all his acts as such are regarded as lawful, so far as third parties are concerned. Public policy requires that they should be so regarded, and that his official authority should not be questioned collaterally. He acts as the sheriff of the county, and it is to the interest of its citizens that his acts should be declared to be valid, so long as he continues thus to act. It has been accordingly held that a person unconstitutionally commissioned a justice of the peace was an officer *de facto*, and his acts valid as to third persons. *Justices of Jefferson County v. Clark*, 1 T. B. Mon. 86; *Wilson v. King*, 3 Litt. 459, 14 Am. Dec. 84. He remains an officer *de facto*, until his office shall be declared to be vacant or forfeited, by a direct proceeding against him, instituted and carried on for that purpose. *Stokes v. Kirkpatrick*, 1 Metc. 143.

Can he, however, in an action against himself, for acting as sheriff, and seizing and selling the property of the plaintiff without lawful authority, defeat the right of recovery, by showing that he acted as an officer *de facto*, or by relying on his certificate of election and qualification in the county court, as conclusive evidence that he was the lawful sheriff of the county?

The principle is well established that, although the acts of an officer *de facto* are valid as to third persons, nevertheless they are invalid so far as he is himself concerned; and his mere color of title to the office will not avail him as a protection in actions against him for trespasses on person or property. *Rodman v. Harcourt*, 4 B. Mon. 229.

It only, therefore, remains for us to inquire whether the certificate of election and the fact that he qualified and gave bond in the county court, as prescribed by law, furnish conclusive evidence that he was the lawful incumbent of the office of sheriff of Russell county.

The examining board is constituted by law for the mere purpose of comparing the polls, and giving a certificate of his election to the candidate having the largest number of votes, according to the returns which have been made by the officers who conducted the election at the different places of voting in the county. It is not the duty of this board to examine into or decide upon the qualifications of the candidates for the office to which they are elected. Consequently the certificate which it issues to a candidate that he is elected to an office is not even *prima facie* evidence that he was eligible to the office, although conclusive evidence that he was elected thereto, unless his election be contested before the proper board.

The duty which the law devolves upon the county court, in regard to the sheriff, only extends to the administration of the appropriate oath of office, and the taking of a bond with sufficient sureties to be ap-



proved of by it. The performance of this duty is incumbent on the county court whenever a person claiming to be entitled to the office of sheriff presents a certificate of his election from the proper board. The court has no power to inquire into his eligibility, or to refuse to permit him to qualify and execute a bond according to law, on the ground that he is ineligible to the office. Consequently, the fact that he has qualified and given an official bond in the county court as sheriff cannot be relied upon to prove his eligibility to the office. \* \* \*

We decide, therefore, in this case, that as Miller acted under color of title to the office of sheriff the sale made by him under the executions in his hands is sufficient to protect the purchaser. But if he were constitutionally ineligible to the office of sheriff when elected, the law will not so far encourage a violation of the Constitution as to permit him to protect himself under a mere color of authority, exercised in opposition to an express mandate of the Constitution, when, too, he must have known that his title to the office was not legal, and, therefore, that all his acts as sheriff were without authority and against law.

The court below, therefore, erred in rejecting the evidence, which was offered to be introduced on the trial, to prove that Miller was not a resident of Russell county when he was elected to the office of sheriff.

Wherefore the judgment is reversed, and cause remanded for a new trial and further proceedings not inconsistent with the principles of this opinion.

The judgment for the appellant's costs in this court must be against Miller alone.<sup>19</sup>

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## SECTION 27.—DE FACTO OFFICE AND AUTHORITY

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### PEOPLE *ex rel.* BUSH *v.* COLLINS.

Supreme Court of New York, 1811. 7 Johns. 549.

An alternative mandamus was directed to a town clerk, commanding him to record the survey of a road, pursuant to the act (Laws 24th Sess. c. 186), or show cause; and the clerk returned that he did not record the survey because the commissioners had not taken the oath of office, and filed a certificate of the oath with the clerk, according to the act.

PER CURIAM. \* \* \* Nor is the allegation material, in this case, that the commissioners had not caused a certificate of their oath of office to be filed in the town clerk's office. If the commissioners of highways acted without taking the oath required by law, they were

<sup>19</sup> See *Courser v. Powers*, 34 Vt. 517 (1861).

liable to a penalty; or the town, upon their default in complying with the requisition of the statute, might have proceeded to a new choice of commissioners. But if the town did not (and it does not appear that they did in this case), the subsequent acts of the commissioners, as such, were valid, as far as the rights of third persons and of the public were concerned in them. They were commissioners *de facto*, since they came to their office by color of title; and it is a well-settled principle of law that the acts of such persons are valid when they concern the public, or the rights of third persons who have an interest in the act done; and this rule is adopted to prevent the failure of justice. The limitation to this rule is as to such acts as are arbitrary and voluntary, and do not affect the public utility. The doctrine on this subject is to be found at large, in the case of *Rex v. Lisle, Andrews*, 263. It certainly did not lie with the defendant, as a mere ministerial officer, to adjudge the act of the commissioners null. It was his duty to record the paper; *valeat quantum valere potest*. It was enough for him that those persons had been duly elected commissioners within the year, and were in the actual exercise of the office. It may be that the oath was duly taken, and that the omission to file the certificate of it was owing to casualty or mistake. The validity of the title of the commissioners to their office must not be determined in this collateral way.

The opinion of the court, accordingly, is that the rule for a peremptory mandamus be granted.<sup>20</sup>

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### PEOPLE v. HOPSON.

Supreme Court of New York, 1845. 1 Denio, 574.

The defendants were indicted for assaulting and beating Peter Lascells, a constable of the town of Salisbury, Herkimer county, and resisting him in the execution of his duty as such constable.

BRONSON, C. J. \* \* \* The next question is on the offer to show that Lascells had not taken the oath of office, or given security, and so was not a legal officer. The evidence would be proper if Lascells, instead of the people, was the party complaining of an injury. If he were suing to recover damages for the assault, it would probably be a good answer to the action that he was not a legal officer, but a wrongdoer, who might be resisted. And clearly he cannot recover fees, or set up any right of property, on the ground that he is an officer *de facto*, unless he be also an officer *de jure*. *Riddle v. County of Bedford*, 7 Serg. & R. (Pa.) 386; *Keyser v. McKissan*, 2 Rawle (Pa.) 139; *Fowler v. Beebe*, 9 Mass. 231, 6 Am. Dec. 62; *Green v. Burke*, 23 Wend. 490; *People v. White*, 24 Wend. 526. When one

<sup>20</sup> See *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409 (1871); also an article on *De Facto Office* by K. R. Wallach, in 22 *Political Science Quarterly*, 450.

man attempts to exercise dominion over the person or property of another, it becomes him to see that he has an unquestionable title.

But it is equally well settled that the acts of an officer de facto, though his title may be bad, are valid so far as they concern the public, or the rights of third persons who have an interest in the things done. Society could hardly exist without such a rule. I will only refer to two or three cases where many of the others have been collected. *People v. Stevens*, 5 Hill, 630; *Green v. Burke*, 23 Wend. 490; *Taylor v. Skrine*, 2 Tread. Const. (S. C.) 696. Now here, although Lascells is a witness, he is not a party; nor is this a proceeding for his benefit. The people are prosecuting for a breach of the public peace; and it is enough that Lascells was an officer de facto, having color of authority. The rights of the creditor, the due administration of justice, and the good order of society all concur in requiring that he should be respected as an officer until his title has been set aside by due process of law. The evidence offered was properly rejected.

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### STATE v. DIERBERGER.

Supreme Court of Missouri, 1886. 90 Mo. 369, 2 S. W. 286.

BLACK, J. The defendant was tried in the St. Louis criminal court on an indictment for murder in the first degree, and was convicted of murder in the second degree. The evidence shows that Dierberger, the defendant, his wife, and sister got into a street car in St. Louis. The deceased, John Horne, his wife, and Joseph Jackson got on the same car. It was about 12 o'clock at night, and the parties were going to their respective homes. The car was filled with passengers, and Horne and Jackson, who the evidence tends to show were somewhat under the influence of intoxicants, went to the front platform, and eventually got into a dispute with the driver, which resulted in the use of boisterous language, and a scuffle between the driver and Jackson. The conductor, followed by the defendant, went from the rear to the front of the car; and, when the door was opened, the driver, Jackson, and perhaps Horne, fell into the aisle of the car. There is evidence that the defendant went to the front platform first to stop the car, which by this time was going at a rapid rate of speed. At all events, immediately, and while the parties were all in the car, defendant stepped up to Jackson, and said he was an officer, and would arrest him, and at the same time took hold of Jackson, who said: "If you are an

<sup>21</sup> Accord: *Heath v. State*, 36 Ala. 273 (1860). See *Commonwealth v. Kane*, 108 Mass. 423, 11 Am. Rep. 373 (1871).

See, also, *Rodman v. Harcourt*, 4 B. Mon. (Ky.) 224, 230 (1843), warrant of justice de facto protects constable; *Bedford v. Rice*, 58 N. H. 446 (1878), on action for penalty by town sufficient that health officers were officers de facto only. See, also, *Patterson v. Miller*, 2 Metc. (Ky.) 493 (1859), ante, p. 321, purchaser from de facto sheriff protected.



officer, I will go with you." Horne then said: "Don't go, Jackson; he is no officer." There is also evidence that Horne said: "I don't give a damn what you are; you can't take him." Other words passed between Horne and the defendant, when the latter drew a pistol, but, at the request of the conductor, put it away. It is said that in less than half a minute defendant pressed Horne to the front of the car, and fired two shots, one of which killed Horne. Again, there is evidence that Jackson hit defendant, when Horne came to Jackson's aid, and a fight or scuffle ensued, in which defendant received bruises and cuts about the face, and in which Horne was killed by one of two shots fired by the defendant.

The defendant put in evidence a written and formal appointment as deputy constable, dated April 21, 1883, and signed by John F. C. Frese, constable of the Thirteenth district. It is conceded this appointment was not filed with the city register, who performs the duties of a county clerk, and that defendant had taken no official oath. For the state the constable testified that he gave defendant the appointment after repeated requests therefor, and that no more was said at that time. He also stated, over objections, that he did not report the appointment and that he did not intend to have defendant act as deputy; but it is not claimed that this intention was communicated to defendant.

The court, among other instructions, told the jury, in substance, that under the evidence defendant was not a deputy constable under the laws of this state; and that a private person who assumes to act as an officer of the law does so at his peril; and although the jury might believe that defendant in good faith believed he was a deputy constable, yet such belief did not authorize him to act as such deputy, nor shield him from unlawful acts.

The statute (section 652) gives every constable power to appoint deputies, for whose conduct he shall be answerable, and provides that the appointment shall be filed in the office of the county clerk. It was said in *State v. Muir*, 20 Mo. 303, that this statute, requiring the appointment to be filed, was directory, though that was a suit against the constable and his sureties for the delinquencies of the deputy. In the later case of *State v. Underwood*, 75 Mo. 230, it was also said that the only object the law has in requiring the appointment to be filed in the office of the county clerk is to preserve the record evidence of the fact of such appointment having been made. In that case the defendant was indicted for killing the deputy while attempting to arrest defendant for another alleged crime. The principle of those cases is applicable here; and the failure to file the appointment cannot deprive the defendant of his right to say that he was a deputy constable.

The more difficult question arises from the failure of the defendant to take an oath of office. Here it may be stated that the uncommunicated intentions of the constable had nothing to do with the case, and the evidence in that behalf should have been excluded. The defendant accepted the appointment for what it purported to be, and his right

to act as a deputy must be tested by it, and the failure to take an oath of office.

The statute (section 3887) provides that a deputy-sheriff shall file his appointment, with the oath indorsed thereon, with the clerk of the circuit court; and as no such statutory provision is made, either as to the oath or its preservation with respect to deputy constables, the opinion seems to prevail, to some extent at least, that the latter are not required to take an oath. But section 6 of article 14 of the constitution requires all officers under the authority of the state, before entering upon the discharge of the duties of their respective offices, to take and subscribe an oath or affirmation to support the constitution, and to faithfully demean themselves in office. Clearly, the deputy constable is an officer under the authority of the state. He should take the oath, and until he does so he is not an officer *de jure*; and the further question is, was he an officer *de facto*?

In *State v. Carroll*, 38 Conn. 449, the conclusion, among others, is reached that one is an officer *de facto* where the duties of the office are exercised under color of a known and valid appointment or election, but where the officer has failed to conform to some precedent requirement or condition; as to take an oath, or give a bond. So the acts of a justice of the peace were held to be valid as to third persons, though he had not taken an oath which the statute made a condition precedent to his right to act as such. *Margate Pier Co. v. Hannam*, 3 Barn. & Ald. 266. The same principle applies in respect of a ministerial officer; as where a deputy constable or sheriff fails to take the oath of office. *Lisbon v. Bow*, 10 N. H. 167; *Merrill v. Palmer*, 13 N. H. 184.

The act of the defendant here in question was probably his first act as deputy, but we do not see how that can make any difference; for the constable had the undoubted right to make the appointment, and the appointment was in every way a good, formal, and valid appointment. The appointment made and constituted him a deputy; and, though he failed to take the oath, he was an officer *de facto*. The principle of law is well settled that the acts of such an officer are as effectual when they concern the public, or the rights of third persons, as though they were officers *de jure*. *Wilcox v. Smith*, 21 Am. Dec. 213; *Hildreth v. McIntire*, 19 Am. Dec. 63, and notes; *State v. Douglass*, 50 Mo. 593; *Adams v. Lindell*, 72 Mo. 198.

Generally, where an officer sues or defends in his own right as a public officer, it is not sufficient that he be merely an officer *de facto*, but to do this he must be an officer *de jure*. *People v. Weber*, 89 Ill. 348; *Patterson v. Miller*, 2 Metc. (Ky.) 493; *Turner v. Keller*, 38 Mo. 332. It has been said, as to an officer *de facto*, that the office is void as to the officer himself, though valid as to strangers.

In *People v. Hopson*, 1 Denio, 575, where the defendants were indicted for resisting a constable in the execution of process which ran in favor of Avery, and against said Hopson, the defendants offered

to prove that the constable had never taken the oath of office, nor given security required by law, and so was not a constable. As to this offer the court said: "The evidence would be proper if Lascells [the constable], instead of the people, was the party complaining of an injury. If he were suing to recover damages for the assault, it would probably be a good answer to the action that he was not a legal officer, but a wrong-doer, who might be resisted. And, clearly, he cannot recover fees, or set up any right of property on the ground that he is an officer *de facto*, unless he is an officer *de jure*. \* \* \* But it is equally well settled that the acts of an officer *de facto*, though his title may be bad, are valid, so far as they concern the public, or rights of third persons who have an interest in the things done. Society could hardly exist without such a rule. \* \* \* The people are prosecuting for a breach of the public peace; and it is enough that Lascells was an officer *de facto*, having color of lawful authority. The rights of a creditor, the due administration of justice, and the good order of society all concur in requiring that he should be respected as an officer until his title has been set aside by due process of law." See, also, to the same effect, *Heath v. State*, 36 Ala. 273. Bishop says the better opinion is that third persons may be indicted for resisting a *de facto* officer. *Bish. Crim. Law* (8th Ed.) § 464. Wharton, in making reference to this current authority says the rule ought not to be extended to cases where the object is to test the right of the party resisted to hold office. *Whart. Crim. Law* (8th Ed.) § 648.

These authorities show that Horne, and, indeed, Jackson, had no right to resist the defendant when in the performance of the legitimate duties of a constable, and would be liable to an indictment for so doing. This being so, it is difficult to see why the defendant may not say that he was an officer *de facto*, and be entitled to protection to the extent that others were bound to respect his official character. It can hardly be said that the state resorts to this proceeding to test the right of the defendant to perform the functions of a deputy constable when there are so many other more appropriate proceedings at hand; but it may rather be said the state here seeks to punish him for doing that which he had no right to do, though an officer he was. The question is by no means free from doubt; but we conclude the defendant should be treated in this case as an officer, and the instructions should proceed upon the theory that he was one. There seems to be no doubt but the defendant believed he was a deputy constable by right in all respects, and the conclusion reached we believe to be in the interest of good order.

The judgment is reversed, and the cause remanded for trial *de novo*. All concur.



## PEOPLE, ex rel. WINSTANLEY v. WEBER.

Supreme Court of Illinois, 1878. 89 Ill. 347.

This was an application in this court by Thomas Winstanley, as city treasurer of the city of East St. Louis, for a writ of mandamus against Herman G. Weber, county collector of St. Clair county, to compel him to pay over to the relator moneys collected by him and taxes belonging to the city of East St. Louis. The defendant's plea presented the question of the validity of the relator's election.

Mr. Justice DICKEY delivered the opinion of the court.

While the acts of an officer de facto are valid, in so far as the rights of the public are involved, and in so far as the rights of third persons having an interest in such acts are concerned, still, where a party sues or defends in his own right as a public officer, it is not sufficient that he be merely an officer de facto. To do this he must be an officer de jure. As an officer de facto he can claim nothing for himself. People ex rel. Sullivan v. Weber, 86 Ill. 283. \* \* \*

The commission under which relator claims title recites that it is issued in pursuance of an election held on the 16th day of April, 1878, and the answer to relator's petition states that "it is from this pretended election that relator obtains all the title he has to the pretended office claimed by him." This allegation of the answer is confessed by demurrer. \* \* \* 22

In the case of Stephens v. People ex rel., 89 Ill. 337, we have held void the election through which relator claims to have acquired the supposed office. \* \* \* It follows that the relator is not a public officer of the character held necessary to entitle him to the relief sought. The application for a writ of mandamus must be denied.

22 Accord: Romero v. United States, 24 Ct. Cl. 331 (1889).

## PART 2

### RELIEF AGAINST ADMINISTRATIVE ACTION

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#### CHAPTER 6

#### ACTIONS TO RECOVER DAMAGES OR MONEY<sup>1</sup>

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#### SECTION 28.—AGAINST ADMINISTRATIVE OFFICERS

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##### MOSTYN v. FABRIGAS.

Court of King's Bench, 1774. Cowp. 161.

LORD MANSFIELD. This is an action brought by the plaintiff against the defendant for an assault and false imprisonment; and part of the complaint made being for banishing him from the Island of Minorca to Carthagena in Spain, it was necessary for the plaintiff, in his declaration, to take notice of the real place where the cause of ac-

<sup>1</sup> As to immunity of judges from liability, see *Kemp v. Neville*, 10 C. B. (N. S.) 523 (1861); *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80 (1878); *Randall v. Brigham*, 7 Wall. 523, 19 L. Ed. 285 (1868); *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646 (1871); *Alzua v. Johnson*, 231 U. S. 106, 34 S. Ct. 27, 58 L. Ed. 142 (1913).

As to liability of justices of the peace, see *Grove v. Van Duyn*, 44 N. J. Law, 654, 43 Am. Rep. 412 (1882).

French Code of Civil Procedure, art. 505: Judges may be sued in the following cases:

(1) If there is malice, fraud, or corruption alleged to have been committed in the course of the examination, or in rendering judgment.

(2) If the right to sue is expressly given by law.

(3) If the law declares the judges liable in damages.

(4) If there is denial of justice.

Decisions of German Imperial Court, vol. 38, p. 338: A judge in deciding causes must not be exposed to the risk of being held responsible for errors in rendering judgment. He may be held liable where he perverts justice deliberately. Otherwise he would be deprived of the independence indispensably necessary to the performance of his functions.

tion arose. Therefore he has stated it to be in Minorca, with a *videlicet*, at London, in the parish of St. Mary le Bow, in the ward of Cheap. Had it not been for that particular requisite, he might have stated it to have been in the county of Middlesex. To this declaration the defendant put in two pleas: First, "not guilty;" secondly, that he was governor of Minorca by letters patent from the crown, that the plaintiff was raising a sedition and mutiny, and that in consequence of such sedition and mutiny, he did imprison him, and send him out of the island, which as governor, being invested with all the privileges, rights, etc., of governor, he alleges he had a right to do. To this plea the plaintiff does not demur, nor does he deny that it would be a justification in case it were true; but he denies the truth of the fact, and puts in issue whether the fact of the plea is true. The plea avers that the assault for which the action was brought arose in the island of Minorca, out of the realm of England, and nowhere else. To this the plaintiff has made no new assignment, and therefore by his replication he admits the locality of the cause of action.

Thus it stood on the pleadings. At the trial the plaintiff went into the evidence of his case, and the defendant into evidence of his; but on behalf of the defendant evidence different from the facts alleged in this plea of justification was given to show that the Arraval of St. Phillips, where the injury complained of was done, was not within either of the four precincts, but is a district of itself more immediately under the power of the governor, and that no judge of the island can exercise jurisdiction there, without a special appointment from him. Upon the facts of the case the judge left it to the jury, who found a verdict for the plaintiff, with £3,000 damages. The defendant has tendered a bill of exceptions, upon which bill of exceptions the cause comes before us; and the great difficulty I have had upon both the arguments has been to be able clearly to comprehend what the question is which is meant seriously to be brought before the court.

If I understand the counsel for Governor Mostyn right, what they say is this: The plea of not guilty is totally immaterial, and so is the plea of justification, because upon the plaintiff's own showing it appears, 1st, that the cause of action arose in Minorca, out of the realm; 2dly, that the defendant was governor of Minorca, and by virtue of such his authority imprisoned the plaintiff. From thence it is argued that the judge who tried the cause ought to have refused any evidence whatsoever, and to have directed the jury to find for the defendant; and three reasons have been assigned. One, insisted upon in the former argument, was, that the plaintiff, being a Minorquin, is incapacitated from bringing an action in the King's courts in England. To dispose of that objection at once, I shall only say it is wisely abandoned to-day; for it is impossible there ever could exist a doubt but that a subject born in Minorca has as good a right to appeal to the King's courts of justice as one who is born within the sound of Bow bell: and the objection made in this case, of its not being stated



on the record that the plaintiff was born since the treaty of Utrecht, makes no difference.

The two other grounds are: 1st. That the defendant being governor of Minorca, is answerable for no injury whatsoever done by him in that capacity. 2dly. That the injury being done at Minorca, out of the realm, is not cognizable by the King's courts in England.

As to the first, nothing is so clear as that to an action of this kind the defendant, if he has any justification, must plead it; and there is nothing more clear than that, if the court has not a general jurisdiction of the subject-matter, he must plead to the jurisdiction, and cannot take advantage of it upon the general issue. Therefore by the law of England, if an action be brought against a judge of record for an act done by him in his judicial capacity, he may plead that he did it as judge of record, and that will be a complete justification. So in this case, if the injury complained of had been done by the defendant as a judge, though it arose in a foreign country where the technical distinction of a court of record does not exist, yet sitting as a judge in a court of justice, subject to a superior review, he would be within the reason of the rule which the law of England says shall be a justification; but then it must be pleaded. Here no such matter is pleaded, nor is it even in evidence that he sat as judge of a court of justice. Therefore I lay out of the case everything relative to the Arraval of St. Phillip's.

The first point, then, upon this ground, is the sacredness of the defendant's person as governor. If it were true that the law makes him that sacred character, he must plead it and set forth his commission as a special matter of justification, because *prima facie* the court has jurisdiction. But I will not rest the answer upon that only. It has been insisted, by way of distinction, that supposing an action will lie for an injury of this kind committed by one individual against another, in a country beyond the seas, but within the dominion of the crown of England, yet it shall not emphatically lie against the governor. In answer to which I say that for many reasons, if it did not lie against any other man, it shall most emphatically lie against the governor.

In every plea to the jurisdiction, you must state another jurisdiction; therefore, if an action is brought here for a matter arising in Wales, to bar the remedy sought in this court, you must show the jurisdiction of the court of Wales; and in every case to repel the jurisdiction of the King's court, you must show a more proper and more sufficient jurisdiction; for if there is no other mode of trial, that alone will give the King's courts a jurisdiction. Now in this case no other jurisdiction is shown, even so much as in argument. And if the King's courts of justice cannot hold plea in such case, no other court can do it. For it is truly said that a governor is in the nature of a viceroy; and therefore locally, during his government, no civil or criminal action will lie against him. The reason is because upon

process he would be subject to imprisonment.<sup>2</sup> But here the injury is said to have happened in the Arraval of St. Phillip's, where without his leave no jurisdiction can exist. If that be so, there can be no remedy whatsoever, if it is not in the King's courts, because when he is out of the government, and is returned with his property into this country, there are not even his effects left in the island to be attached.

It does not follow from hence that, let the cause of action arise where it may, a man is not entitled to make use of every justification his case will admit of, which ought to be a defense to him. If he has acted right according to the authority with which he is invested, he must lay it before the court by way of plea, and the court will exercise their judgment whether it is a sufficient justification or not. In this case, if the justification had been proved, the court might have considered it as a sufficient answer; and, if the nature of the case would have allowed of it, might have adjudged that the raising a mutiny was a good ground for such a summary proceeding. I can conceive cases in time of war in which a governor would be justified, though he acted very arbitrarily, in which he could not be justified in time of peace. Suppose, during a siege or upon an invasion of Minorca, the governor should judge it proper to send an hundred of the inhabitants out of the island from motives of real and genuine expediency; or suppose upon a general suspicion he should take people up as spies; upon proper circumstances laid before the court, it would be very fit to see whether he had acted as the governor of a garrison ought, according to the circumstances of the case. \* \* \*

Therefore, in every light in which I see the subject, I am of opinion that the action holds emphatically against the governor, if it did not hold in the case of any other person. If so, he is accountable in this court or he is accountable nowhere; for the King in council has no jurisdiction. Complaints made to the King in council tend to remove the governor, or to take from him any commission, which he holds during the pleasure of the crown. But if he is in England, and holds nothing at the pleasure of the crown, they have no jurisdiction to make reparation, by giving damages, or to punish him in any shape for the injury committed. Therefore to lay down in an English court of justice such a monstrous proposition as that a governor, acting by virtue of letters patent under the great seal, is accountable only to God and his own conscience, that he is absolutely despotic, and can spoil, plunder, and affect his Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.

In Lord Bellamont's Case, 2 Salk. 625, cited by Mr. Peckham, a motion was made for a trial at bar, and granted, because the Attorney General was to defend it on the part of the King, which shows plainly that such an action existed. And in *Way v. Yally*, 6 Mod. 195, Justice Powell says that an action of false imprisonment has been brought

<sup>2</sup> See *Hill v. Bigge*, 3 Moore, P. C. 465, 481 (1841), *contra*.

here against a governor of Jamaica, for an imprisonment here, and the laws of the country were given in evidence. The governor of Jamaica in that case never thought that he was not amenable. He defended himself, and possibly showed, by the laws of the country, an act of the assembly which justified that imprisonment, and the court received it as they ought to do. For whatever is a justification in the place where the thing is done ought to be a justification where the cause is tried.

I remember, early in my time, being counsel in an action brought by a carpenter in the train of artillery, against Governor Sabine, who was governor of Gibraltar, and who had barely confirmed the sentence of a court-martial, by which the plaintiff had been tried, and sentenced to be whipped. The governor was very ably defended, but nobody ever thought that the action would not lie; and, it being proved at the trial that the tradesmen who followed the train were not liable to martial law, the court were of that opinion, and the jury accordingly found the defendant guilty of the trespass, as having had a share in the sentence, and gave £500. damages. \* \* \*

Judgment affirmed.<sup>3</sup>

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#### HATFIELD et al. v. GRAHAM, Judge, et al.

Supreme Court of Appeals of West Virginia, 1914. 73 W. Va. 759, 81 S. E. 533, L. R. A. 1915A, 175, Ann. Cas. 1917C, 1.

Application for writ of prohibition by H. D. Hatfield and others against John T. Graham, Judge, and others. Writs awarded.

WILLIAMS, J. H. D. Hatfield, Thomas Davis, Foster Templeton, Heber Rice, and Grover Rippetoe have applied for a writ of prohibition to prohibit John T. Graham, judge of the Circuit Court of Cabell county, from entertaining jurisdiction of and from further proceeding in a certain action now pending in said court, brought against them by the Socialist Printing Company, a corporation. The petition substantially avers that the Socialist Printing Company brought an action of trespass on the case in the circuit court of Cabell county against petitioners, in which it was alleged that petitioners had combined and conspired together to destroy a certain printing office owned by plaintiff, and to suppress and destroy a newspaper published by it, known as the "Socialist and Labor Star," and that in consequence of such conspiracy they did suppress and destroy said paper, thereby damaging the plaintiff to the amount of \$10,000. Petitioners further aver that on the 2d of February, 1914, they appeared to said action in open court and tendered and filed a special plea, verified by the affidavit of Heber Rice, one of said defendants, in which they averred:

<sup>3</sup> See Pollock, Torts, c. IV, 1, "Acts of State"; also *Musgrove v. Chun Tee-ong Toy*, [1891] A. C. 272, 282, 283.

As to statutes for protection of officers, see Chitty, Pleading, I, 545, 546; Public Authorities Protection Act, 1893, 56 & 57 Vict. c. 61.



"That at the time of the alleged grievances the said H. D. Hatfield was and is now Governor of the state of West Virginia and, as such, commander of the military forces thereof; that Thomas Davis, Foster Templeton, Heber Rice, and Grover Rippetoe were each officers in the West Virginia National Guard holding rank as follows: Thos. B. Davis, major, Foster Templeton and Heber Rice, first lieutenants, and Grover Rippetoe, second lieutenant—and, as such, subject to the orders and control of said Governor and commander in chief; that a state of war, insurrection, and riot was, and had been for a long time prior theretofore, in existence in certain portions of the counties of Fayette, Raleigh, Kanawha, and Boone, and recognized and proclaimed by proclamation of Wm. E. Glasscock, Governor, on the 10th day of February, 1913, and a portion of the said West Virginia National Guard then occupied said proclaimed territory; that many lives and much property had been destroyed, and that riot and bloodshed was then rampant and pending, and that the state had spent about one-half million dollars in trying to restore peace and order and a due execution of the laws in said proclaimed territory; that a proposition for settlement was then pending and about to be agreed to by all the contending forces in said territory, and that the plaintiff, the Socialist Printing Company, was then publishing a newspaper called the 'Socialist and Labor Star' at its plant in Huntington, W. Va., which newspaper had large circulation in the proclaimed territory, and exerted great influence therein; that the plaintiff was using said newspaper unlawfully in keeping up the war, insurrection, riot, and bloodshed, and counseled, aided, abetted, and supported those persons therein who were at war and insurrection against the government of the state; that the issue of the said paper of the week of May 5, 1913, was especially designed to prevent a settlement of the insurrection as then proposed and about to be agreed upon, and afterwards agreed upon, and that said Governor had cause to believe and did believe that said plaintiff was combining and conspiring, and supporting hostile action thereby against said state; that on the 5th day of May, 1913, said Governor issued his warrant for the arrest of the officers of said plaintiff company, and ordered that its said proposed issue of the week of May 5, 1913, be suppressed; that, in obedience to said warrant and order, certain officers of the said plaintiff company were arrested, the said plant taken possession of on the night of May 8, 1913, the advanced sheets of the issue of that week taken possession of, and the type of said issue then set up was pied, and the room in which the plant was located locked up, and said plant, on the morning of the 10th of May, 1913, was returned to the possession of the said plaintiff without damage, except the suppression of said issue by pieing said type; the said defendants denied any conspiracy to destroy said plant, and denied that the same or any part thereof was destroyed."

They allege that said special plea and all the matters therein contained are true, and exhibit a copy of it with their petition, and pray

that it be read and considered as a part of their petition. They further aver that on the day said special plea was filed the plaintiff in said action appeared by counsel and moved the court to strike it from the record as not being sufficient in law, and that the court sustained the motion and struck the plea from the record, over the objections and exceptions of petitioners, and set a day for the trial of said case; that the matters set up in said special plea are true, and are admitted to be true, and that the same constitute a bar to the further prosecution of said case; that the warrant of arrest and order to suppress the issue of said paper for the week of May 5, 1913, were acts of the chief executive of the state fully authorized by the Constitution and laws of the state for the preservation of the state; that the issuance of the same were within his discretion; that he had just cause to believe and did believe that such action was necessary; that he did in no way abuse his discretion in so doing; that said warrant and order were properly and legally carried out according to the command of said Governor by said officers as it was their duty to do under section 16 of chapter 147 of the Code; that there is nothing in said record of said case alleging an abuse of discretion or of official duty; and that there was none. Petitioners further aver that Thos. B. Davis, Heber Rice, Grover Rippe-toe, and Foster Templeton were, at the time of the alleged commission of said grievances, officers in the lawful exercise or discharge of their official duties under an order and proclamation of the Governor of this state, and are not, by express provision of law, to be held personally responsible therefor in any action, suit, prosecution, or proceeding, civil or criminal; that the circuit court of Cabell county has no jurisdiction to proceed further in the trial of said case; and that, in attempting to do so, the judge of said court is exceeding and abusing his jurisdiction. And they pray that he be prohibited from further proceeding in said cause.

Upon the filing of the petition a rule was awarded, to which the Socialist Printing Company demurred, and also made answer or return, and also filed an amended return. Petitioners moved to strike the return and amended return from the record, on the ground that they were not responsive to the rule, and also replied generally. Following the established practice of this court, the motion to exclude was taken under consideration, together with all matters arising upon the merits of the cause.

Respondent admits that the petition correctly sets forth the matters averred in the special plea tendered by petitioners, and that, pursuant to its motion, the court struck it out and refused to entertain it; that, at the time of the alleged grievances complained of, H. D. Hatfield was, and that he is now, Governor of the state of West Virginia, and ex officio commander in chief of the military forces thereof; that Thomas Davis, Foster Templeton, Heber Rice, and Grover Rippe-toe were then members of the military forces with the official rank claimed by them in the petition; that about the 10th of February, 1913, Wm. E.

Glasscock, former Governor of West Virginia, issued his proclamation placing parts of certain counties in the Kanawha coal field under martial law, and that a portion of the military forces then occupied said territory; that said proclamation was in force at the time of the alleged injury; that much rioting and lawlessness existed in said territory, and that the state had spent much money in trying to restore peace and order; that the Governor issued his warrant for the arrest of the officers of the respondent company, but denies that the said warrant authorized the pieing of its type, demolishing of its forms, and suppressing of its newspaper; and avers that the Governor, at the time of issuing his warrant, gave secret verbal orders to the aforesaid subordinate military officers to suppress its paper, and denies his lawful authority to give such an order, and denies that the law protects his subordinate officers in obeying such an order. It also admits the pendency of a proposition for the settlement of the industrial controversy then existing between the coal operators and the miners, which had been submitted by the Governor for the mutual consideration of the contending parties; but it avers that said proposition was unfair to the miners. The record does not disclose what the proposition was. Respondent admits that, through the columns of its newspaper, it severely criticized the aforesaid proposition for a settlement, for the alleged reason that it believed that an acceptance of it by the miners would be against their best interest and a great detriment to their cause. It denies that its newspaper had great influence and large circulation in the martial zone, but admits that it had about 20 subscribers in said territory. It also avers many other matters of fact which, however, are not responsive to the writ, and therefore not material for the purposes of this suit.

The material facts alleged in the petition are admitted. Therefore the only questions presented to this court are questions of law relating to the power of the Governor and the jurisdiction of the court to inquire into and pass upon the legality of his official act. Could the court retain jurisdiction of the action after the official character of the petitioners and the official act of the Governor, which was the cause of the alleged injury, were brought to its notice by the special plea? Should it not have entertained the plea, and, no issue of fact being raised, should it not have dismissed the action for want of jurisdiction? Consistent with both reason and authority, we think the questions require an affirmative answer. The declaration did not disclose the official character of petitioners, or that the alleged wrong was in consequence of an official act of the Governor. Consequently, so far as it appeared upon the face of the declaration, the court had jurisdiction. It had jurisdiction of causes such as was alleged. But, when the official character of defendants and the purpose the Governor, as commander in chief of the military forces of the state, had in view in directing the thing to be done that is complained of in the declaration, and his good faith and honest belief in the necessity for doing it, were



made to appear by the special plea which was not replied to, the court should have dismissed the action for want of jurisdiction.

The Governor of the state cannot be held to answer in the courts in a civil action for damages resulting from the execution of his lawful orders or warrants issued in good faith in discharge of his official duties. The Constitution and laws of the state vest in him certain powers and duties, and he is necessarily clothed with the right to determine what his duties are in any emergency; and, so long as he acts within the limits of his constitutional powers and privileges, his official conduct is not subject to review in any other manner than that provided by the Constitution which created his high office. Section 5, art. 7, of the Constitution (Code 1906, p. lxv) says, "the chief executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed;" and section 12 of the same article (Code 1906, p. lxvi) makes him commander in chief of the military forces of the state, except when they are called into service of the United States, and empowers him to call them out to execute the laws, suppress insurrection, and repel invasion. He has the power to declare that a state of war exists in any part of the state, and to proclaim martial law for the government of such disturbed district, and to make use of the military forces to restore peace, law, and order; and his official acts in that respect are not reviewable by the courts. *Nance and Mays Case*, 71 W. Va. 519, 77 S. E. 243. He is vested with the discretion to determine whether the conditions existing are such as to make it necessary to put in operation and effect the military power of the state, and, having once exercised his judgment in the premises, in good faith, the courts have no power to review it and to declare his official act void.

The fundamental idea underlying our federal and state systems of government is a division of powers among the three branches thereof, the executive, the legislative, and the judiciary. Every one of these is made as independent of the other two as it was thought wise and practicable by the framers of our Constitutions to make them. The official acts, orders, and proclamations of the chief executive, made within the scope of his constitutional powers, are no more subject to review by the courts than acts passed by the Legislature. It follows from the very nature and Constitution of our government, and from the character of the powers and duties with which it has clothed the chief executive, that he must determine for himself the necessity for the exercise of such power as is vested in him. There is no higher authority in the state to determine it for him. Within his constitutional duties and powers he is supreme. Like any other officer of the state, he is liable to impeachment in the manner provided by the Constitution (article 4, § 9 [Code 1906, p. liv]) for "maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor." But there is no other manner of reviewing his official conduct. If the courts could, while the Governor is in office, review his official acts and proclamations and pronounce them illegal,

then the judiciary, and not the Governor, would be the chief executive power in the state. But there is nothing in the Constitution investing the judiciary with power to declare void an order or proclamation which the Governor has the constitutional power to make. We do not mean to intimate that a Governor, because of his exalted office, is incapable of doing wrong, or that he would not be liable for wantonly, maliciously, and unnecessarily injuring the person or property of a citizen. We can imagine instances wherein he might so clearly overstep the bounds of his constitutional powers as to make himself personally liable; but such instances are extremely unlikely to occur, nor does the suit now pending in the circuit court of Cabell county, which we are asked to prohibit, involve an act of that character.

From the facts set up in the petition and admitted in the return, a case is presented which required the exercise of executive discretion. Martial law had existed in a portion of the state for many months, and had cost the state a large sum of money. The Governor was earnestly endeavoring to restore law and order, and the means employed by him, which was the submission to the opposing forces in the industrial war a proposition of compromise for their consideration, was severely criticized. What were the terms of that proposition and the character of the criticisms which respondent had published in its newspaper, and intended to continue to publish, do not appear. But the petition alleges that their effect was to encourage a continuation of disorder and rioting in the martial zone, and that the Governor had cause to believe and did believe that it was necessary, in order to restore peace, to suppress the publication of the issue of the paper then about to be published. Under the ordinary conditions of peace the Governor could not have lawfully exercised such apparently arbitrary power; but a condition existed that amounted to domestic war, and called for the exercise of the military power of the state to suppress it. The act complained of was done in obedience to a military command of the Governor, acting as commander in chief of the state's military forces. The necessity for the act is its justification, and the Governor had the discretion to determine whether the necessity therefor existed, and, having had cause to believe that the necessity did exist, the courts have no power to review his discretion and pronounce his warrant or command unlawful, as being in excess of his constitutional power.

True it is that ours is a government by the people; but it must also be remembered that it is a government by laws, and that the people have delegated, for the time being, their power to faithfully execute the laws to their chief executive, and have, by their Constitution, clothed him with the requisite power to do so. Of course the Governor must act in good faith; he cannot injure the person or property of a citizen unnecessarily, wantonly, or maliciously, even under color of his high office; and when his act is justifiable, as in the present case, only on the ground of public necessity, he must have reasonable ground to believe that the necessity therefor exists. But the facts constituting the

grounds for his belief must be viewed from his standpoint, and in the light of the exigencies as they appeared to him, because he is compelled to judge of their sufficiency in the first instance, and, unless his belief is wholly unfounded, the legality of his act is unquestionable. Where there is ground for his belief, the court cannot substitute its judgment for his. The necessity for his act makes it both lawful and "due process" within the meaning of the Constitution of the United States. *Moyer v. Peabody*, 212 U. S. 78, 29 S. Ct. 235, 53 L. Ed. 410. \* \* \*

The Governor's action not being reviewable by the courts, it follows necessarily that the action of the other petitioners, who are admitted to be his subordinate military officers, and to have acted in obedience to his orders are not reviewable. It was their bounden duty to obey the lawful orders of the Governor. To refuse to do so would have subjected them to punishment, certainly to a fine and, at the discretion of the court, to imprisonment. Section 16, c. 147, Code.

The fact that a part of the Governor's command to his subordinate officers was not embraced in his written warrant cannot affect the merits of the question. The petition alleges that what they did was done in obedience to his command. It matters not that the command was not in writing. He was acting by virtue of his military authority, and it is not essential that a military officer shall give all of his commands in writing.

On the point that the refusal of the courts to entertain jurisdiction in cases like the present would leave the party complaining without remedy, Judge Cooley, in the last above-cited case, at page 330 of 29 Mich. (18 Am. Rep. 89), says: "Practically there are a great many such cases; but theoretically there are none at all. All wrongs, certainly, are not redressed by the judicial department. A party may be deprived of a right by a wrong verdict, or an erroneous ruling of a judge, and, though the error may be manifest to all others than those who are to decide upon his rights, he will be without redress. A person lawfully chosen to the Legislature may have his seat given by the House to another, and be thus wronged without remedy. A just claim against the state may be rejected by the board of auditors, and neither the Governor nor the courts can give relief. A convicted person may conclusively demonstrate his innocence to the Governor, and still be denied a pardon. In which one of these cases could the denial of redress by the proper tribunal constitute any ground for interference by any other authority? The law must leave the final decision upon every claim and every controversy somewhere, and, when that decision has been made, it must be accepted as correct. The presumption is just as conclusive in favor of executive action as in favor of judicial. The party applying for action, which, under the Constitution and laws, depends on the executive discretion, or is to be determined by the executive judgment, if he fails to obtain it, has sought the proper remedy and must submit to the decision."



The want of jurisdiction was brought to the attention of the court by the special plea, and it should have dismissed the action. It did not do so, but retained it for the purpose of trial, thereby exceeding its jurisdiction; and the writ will be awarded.

ROBINSON, J. (dissenting). This decision extends state wide the martial law doctrine heretofore by a majority of this court enunciated as to a particular, proclaimed zone. Again I dissent, consistently with my views in the former cases. *Nance & Mays Cases*, 71 W. Va. 527, 77 S. E. 243; and *In re Jones*, 71 W. Va. 609, 77 S. E. 1029.

Moreover, a new use is made of the writ of prohibition. The decision stops the trial of an action in which the declaration alleges that certain defendants maliciously trespassed on private rights guaranteed by the Constitution, simply because the defendants say the act was done by the orders of one of them who was the Governor of the State. It prohibits the circuit court having jurisdiction to determine the fact whether the act was done maliciously, from trying that or any other issue on the declaration. The plaintiff is not allowed to be heard on its allegations that its constitutional rights have been violated, but on the other hand the word of the defendants that they violated those rights justifiably is accepted as true. The opinion, by its own dicta as well as by quotation from one of the greatest of authorities on constitutional law, admits that courts will entertain suits for damages from malicious trespasses by officials and military officers. Then, why is this action not allowed to be entertained? Though the declaration charges a malicious trespass in the plainest of terms, the presence of that charge is ignored in the majority opinion.

To stop the action by prohibition is only to deprive the plaintiff of another constitutional right—the right to a hearing before the properly constituted trial court of the fact as to whether there was malicious or unjustifiable act. The opinion concedes that the declaration states a good cause of action, yet it prohibits the allegations of malicious trespass from being tried. This court cannot rightly determine the charge presented by the declaration. It has no province for original trial of an alleged wrong. The truth of the charge of the wrong should be left to the established trial court.

Certainly the Governor cannot be made to answer before the courts for acts within his political province. But the declaration alleges that he committed acts wholly beyond his official powers. No Governor as such official can do a malicious act. On such a charge as the declaration contains the Governor is answerable before the trial court the same as any other citizen. The charge may there be shown to be untrue, or the act charged to be not malicious but justifiable. Still a competent trial court in which the charge is made has jurisdiction to determine whether the charge is true or the act justifiable.

The unsound principle established by this decision permits a Governor to deal with private rights and private property as he pleases. He has only to answer that he does so officially, and an action, though

alleging facts showing that his act is wholly without his political province, will be prohibited. Such a view is wholly un-American, and inconsistent with constitutional government. Reason and authority condemn it, and the administration of even-handed justice cries out against it.<sup>4</sup>

### BASSETT v. GODSCHALL et al.

Court of Common Pleas, 1770. 3 Wilson, 121.

Action on the case for refusing to grant license, and to receive from plaintiff a certificate of character tendered upon an application for a license to keep a common inn and alehouse.

WILMOT, Chief Justice. The legislature hath intrusted the justices of peace with a discretionary power to grant or refuse licenses for keeping inns and alehouses; if they abuse that power, or misbehave themselves in the execution of their office or authority, they are answerable criminally, by way of information, in B. R.<sup>5</sup> I cannot think a justice of peace is answerable in an action to every individual who asks him for a license to keep an inn or an alehouse, and he refuses to grant one; if he were so, there would be an end of the commission of the peace, for no man would act therein. Indeed, he is answerable to the public if he misbehaves himself, and willfully, knowingly and maliciously injures or oppresses the King's subjects, under color of his office, and contrary to law; but he cannot be answerable to every individual, touching the matter in question, in an action. Every plaintiff in an action must have an antecedent right to bring it; the plaintiff here has no right to have a license, unless the justices think proper to grant it, therefore he can have no right of action against the justices for refusing it.

Judgment for defendants.<sup>6</sup>

<sup>4</sup> For an action brought against a former President for an act done while in office, see *Livingston v. Jefferson*, 1 Brock, 203, Fed. Cas. No. 8,411 (1811). The suit was dismissed on a point of venue. For actions against heads of departments, see *Kendall v. Stokes*, 3 How. 87, 11 L. Ed. 506 (1845), and *Spalding v. Vilas*, 161 U. S. 483, 16 S. Ct. 631, 40 L. Ed. 780 (1896); *Mellon v. Brewer* (App. D. C.) 18 F.(2d) 168 (1927); also 5 Op. Attys. Gen. 759 (1823).

For actions arising out of the exercise of military power or martial law, see *Martin v. Mott*, 12 Wheat. 19, 6 L. Ed. 537 (1827); *Vanderheyden v. Young*, 11 Johns. (N. Y.) 150 (1814); *In re Boyle*, 6 Idaho, 609, 57 P. 706, 45 L. R. A. 832, 96 Am. St. Rep. 286 (1899).

<sup>5</sup> As to criminal liability, see *Rex v. Williams*, 3 Burr. 1317 (1762); *People v. Norton*, 7 Barb. (N. Y.) 477 (1849).

<sup>6</sup> Accord: *Halloran v. McCullough*, 68 Ind. 179 (1879).

## PARTRIDGE v. GENERAL COUNCIL OF MEDICAL EDUCATION AND REGISTRATION OF UNITED KINGDOM.

Supreme Court of Judicature, Queen's Bench Division, 1890.

25 Q. B. D. 90.

Action for unlawfully and maliciously causing the plaintiff's name to be removed from the register kept under the Dentists' Act, 1878.

LORD ESHER, M. R. In this case an action is brought against the defendants for unlawfully and maliciously removing the name of the plaintiff from the dentists' register. I think that the learned judge who tried the case must be taken to have found that the defendants acted without malice. It is perfectly clear to my mind that his finding is right, and that in doing what they did they were not acting maliciously, but endeavoring to do their duty to the public and their profession. But nevertheless, it is clear that, in doing what they did on this occasion, they did not take the course which they ought to have taken. They struck off the plaintiff's name without communicating with him or giving him an opportunity of being heard. When the case came before us on the previous occasion,<sup>7</sup> the question then being whether he was wrongly struck off the register, we said they had not taken the proper steps, and they must put his name on the register again, without prejudice to the question whether on subsequent inquiry there might appear to be proper grounds for striking him off under section 13 of the act. But the question, upon an application for a mandamus to have his name reinserted on the register, whether they acted rightly in striking him off, in the sense that they took the proper steps, is quite a different question from the question whether an action will lie against them, in the absence of malice, for wrongfully removing his name.

The question now is whether such an action will lie. I think the defendants were intending, in what they did, to do what they were entitled to do, viz., to perform the public duties imposed upon them by the act for the protection of the public and also of the profession. There are two sections, apparently, which are material to this question, the eleventh and the thirteenth. It seems to me that the thirteenth was the section under which they ought to have acted, if there was any question of erasing the name of a person from the register for having acted disgracefully in a professional respect. But I think that in any case they bona fide intended to act under the act of Parliament which gives them powers as to the register. That being so, the question is whether they were acting merely ministerially. Whether they were intending to act under section 11 only, or under section 13 as well, if they were not so acting, it appears to me that in the absence of malice they are protected from an action. If they were acting under section 13, I think the functions they were so exercising were

<sup>7</sup> See *Ex parte Partridge*, 19 Q. B. D. 467 (1887).



clearly judicial, and not merely ministerial, and that they would, therefore, not be liable to an action for the erroneous exercise of those functions without malice. If they were intending to do what they were authorized to do under section 13, but were advised to proceed under the wrong section, I think they would not be liable to an action for acting erroneously under a wrong section of the act, as they intended to act under the act and what they did was not merely ministerial.

But, assuming that they were not intending to exercise the functions given by section 13 at all, but were proceeding solely under section 11, without regard to those functions, what is it they have to do under that section? The power given to them is a power to give a special direction to the registrar. They have, then, given a special direction to the registrar to erase the plaintiff's name. Is giving a special direction to the registrar under that section merely a ministerial act, to be done without the exercise of any discretion at all? I do not think so. I think it is clearly discretionary. Now it appears to me that it is a true proposition to say that, when a public duty is imposed by act of Parliament upon a body of persons, which duty consists in the exercise of a discretion, it cannot be said that the exercise of that discretion is a merely ministerial act. If what the defendants did cannot be considered to have been merely ministerial, then I think, for the purposes of the question whether they are protected from an action, it must be considered as judicial. It appears to me that a body such as the defendants can only be made subject to an action for things which they have done erroneously without malice in carrying out their duties under the act, if it can be shown that they were acting merely ministerially.

It is not necessary to go through the cases that have been cited on the subject. They seem to me all to show that such an action as this cannot be maintained, except where the duty intended to be exercised is only ministerial. For these reasons it appears to me that this action is not maintainable, and that the judgment of *Hudleston, B.*, was correct.<sup>8</sup>

<sup>8</sup> Section 11 of the Dentists' Act provides that every registrar, shall in all respects, in the exercise of his discretion and duty in relation to any register under this act, conform to any orders made by the general council under this act, and to any special directions given by the general council. Section 13 provides that the general council may cause inquiry to be made into the case of a person alleged to be liable to have his name erased from the register, on proof of conviction of a felony or misdemeanor, or of infamous or disgraceful conduct.

## DOWNER v. LENT.

Supreme Court of California, 1856. 6 Cal. 94, 65 Am. Dec. 489.

Appeal from the superior court of the city of San Francisco.

The complaint sets forth that the plaintiff was duly appointed and qualified as a pilot for the port of San Francisco on June 17, 1854; that on the 27th of July following the defendants, who in the meantime had been appointed and qualified as the board of pilot commissioners, and acting as such board, notified plaintiff to surrender his license, and on the 8th of August following published in a San Francisco newspaper the following notice:

"Consignees' Notice.—To Shipmasters and Consignees: Notice is hereby given that Capt. Thomas P. Downer is no longer authorized to act as pilot for this port.

"Per order of the Pilot Commissioners.

"James M. Wilson, Secretary.

"August 8, 1854."

All of which the complaint, in a second count, alleges was done by defendants wrongfully and maliciously, and with knowledge of plaintiff's rights, with intention to injure plaintiff and to deprive him of the benefits and emoluments of his franchise, and to his damage and injury in the sum of \$2,500, for which sum he prays judgment.

No malice is averred in the first count. The defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action—specifying, among other grounds of objection, that the defendants were not liable in their individual capacity for the exercise of their discretion as a board of pilot commissioners, and that it appeared by the complaint that the acts complained of were done by defendants as such board.

The demurrer was overruled, and the defendants answered. The cause was tried before a jury, who found a verdict for the plaintiff for \$2,000. Defendants moved for a new trial, which was denied, and judgment entered upon the verdict. Defendants appealed.

The opinion of the Court was delivered by Mr. Justice HEYDENFELDT. Mr. Chief Justice MURRAY and Mr. Justice TERRY concurred.

It is beyond controversy that the power of the board of pilot commissioners is quasi judicial, and they are not civilly answerable. They are public officers to whom the law has intrusted certain duties, the performance of which requires the exercise of judgment. They are unlike a ministerial officer, whose duties are well defined, and who must fail to execute them properly at his own peril.

Whenever, from the necessity of the case, the law is obliged to trust to the sound judgment and discretion of an officer, public policy de-

mands that he should be protected from any consequences of an erroneous judgment.

The court erred in refusing to sustain the demurrer to the declaration, and the judgment is reversed.

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SEAMAN v. PATTEN.

Supreme Court of New York, 1805. 2 Caines, 312.

On certiorari to the justices' court in the city of New York.

It appeared from the return that the action below was brought against the now plaintiff to recover from him, as inspector general of provisions, twenty-five dollars, for condemning, as unmerchantable, some beef belonging to the present defendant. The record stated: That at the trial the now plaintiff moved for a nonsuit, because the barrel containing the beef had not been branded with the name of the maker, according to the directions of the act; because, also, no malice or corruption was proved. That these reasons were disallowed, because the court were of opinion, on the first point, that an offer by the cooper, or his authorized agent, to brand the barrels, and a refusal by the inspector to permit them to be branded, were equivalent to a branding; and, on the second, because it was not necessary to prove malice or corruption, to sustain the action, the inspector general being liable for injuries arising from want of skill.

Error having been assigned on each of these grounds, the case now came before the court.

LIVINGSTON, J., delivered the opinion of the court. In our opinion the judgment rendered on this verdict is erroneous, and must be reversed.

Without denying the general principle (which is too well settled to admit of controversy) that unless the Legislature provide for the protection of officers of this description, they act at their peril, although their conduct be bona fide, and according to the best of their judgment, there are, in this case, sufficient marks of distinction to justify our not adding it to the revolting precedents which are already to be found on this subject. In making use of this term, I do but little more than follow the example of most judges who have been called on to enforce a rule which they admit to be a hard one, and against the operation of which modern legislators, unless from oversight, generally take care to guard. The whole court, in the case of *Warne v. Varley*, 6 T. R. 443, seem solicitous to discover some ground on which the defendant, who had acted fairly and bona fide, might escape. This liability was first enforced against officers who acted as volunteers, and generally received a portion of the spoil. These were collectors and excise officers, who were neither bound by oath, nor enjoined by law, to make seizures, but might do so or not, as they pleased. Thus in *Imlay v. Sands*, 1 Caines, 566, decided



in February term, 1804, the defendant, who was collector of the port of New York, in seizing a vessel, with a very valuable cargo, was under no legal injunction to do so, and would have been entitled to a very considerable share of the proceeds arising from confiscation.<sup>10</sup> In such case there is no rigor in letting an officer act at his peril, and in putting his justification on the event. But when persons in a public capacity act upon oath, in matters, too, which require skill and experience, and in which men may honestly differ in opinion, it seems cruel not to protect them when they conduct themselves with integrity, and without abusing their authority, or manifesting any symptoms of malice.

But this alone, if the case of *Warne v. Varley* be a precedent, affords no justification. Some other excuse, then, must be found for the plaintiff, or he cannot escape. Let us, then, see whether, in the terms of the law, an ample justification will not be found, and such a one as the Court of King's Bench seemed willing to admit in the case just mentioned. The defendant there pleaded that he had seized the leather because, "in his judgment, the same was not well dried." But the act of Parliament had not given him authority to seize what, in his judgment, was not sufficiently dried, but only generally to seize leather of that description, without referring to his judgment at all. If it had, Lord Kenyon would not have held him liable. "It seems reasonable," says he, "that if these searchers exercise their authority bona fide, and only seize such leather as in their judgment ought to be examined, they should be protected; but the act of Parliament affords them no such protection." From this mode of expression, as well as from the reason of the thing, it is clear that, where the judgment or opinion of the officer is expressly referred to by law as the rule of his conduct, he cannot, and ought not, to be answerable for an upright use of it, but is as much protected by a clause of this kind as by those which are usually introduced for this purpose. This reference will be found throughout the law under which Seaman acted, and must have been made to prevent his being harassed by demands of this nature. Everything almost which, as inspector general, he is to do, is to depend on his judgment or opinion. He swears "he will faithfully and impartially, according to the best of his ability, perform his duty, without any willful omission, neglect, or delay whatever." Is it not a little extraordinary that, when the Legislature exact no more of a man than an exertion of his best abilities, he should still be responsible, merely because another may have more ability or capacity than himself?

The fourth section authorizes him to remove without the city all such beef and pork as shall appear to him to be in danger of spoiling,

<sup>10</sup> As to history of compensation of revenue officers, see *U. S. v. Walker*, 22 How. 299, 16 L. Ed. 382 (1859); also 1 Rev. St. N. Y. (1st Ed.) pp. 340, 356.

For early action of trespass against customs officers, see Hubert Hall, *Customs Revenue*, II, 42.

etc. Will it be said that he would also be liable, if he should bona fide order any of these articles to be removed, if it turned out that they were in no danger of spoiling? Shall it be his duty to remove these articles, shall he swear that he will perform his duty, nay, shall he be liable to a heavy penalty for neglect, and shall his own opinion be made the only criterion of the necessity or propriety, and shall he not dare to exercise it? So again, in the same section, he is to order beef or pork, in a putrid state, to be removed, if in his opinion the removal be necessary. Surely it would be a satisfactory defense to an action, on this part of the statute, to say that the removal in his opinion was necessary. Why vest such power in him, as a security for the health of the city, if he be not to use it? If too latitudinary, the Legislature, and not he, is to blame.

Again, by the first section he may remove certain provisions, if in his judgment it be proper. The eleventh section, in like manner (and this applies more immediately to the present action), declares that the barrels, in which beef shall be repacked (which must, of course, be judged of before they can be inspected), shall, in the opinion of the inspector general, be every way strong, and tight enough to prevent the pickle from leaking out. Now, if this be an action for not inspecting the beef, and it can be no other, notwithstanding the inaccuracy of the return, calling it an action for condemning the property, which the inspector could not do, who can say that the plaintiff was of opinion that the barrel was as tight and strong as it ought to be? If he were not, it was his duty, however incorrect the opinion may have been, to refuse its inspection; for it must be an incontrovertible position that when by law it is made the duty of a public agent, however high or low his station, to do a thing, if in his opinion certain requisites are complied with, he can never be liable for omitting to act (which it is attempted to make him here), without proving corruption, malice, or some misbehavior. It does not appear why the beef was refused. It may have been for the very cause just mentioned, which would be a complete defense.

But if the inspector proceeded on the ground, as it would seem he did, of the barrel's not being branded with the name of the person who made it, he was also justifiable. The sixteenth section is explicit on this point, and it is admitted no such brand appeared. An offer to brand was not sufficient. It is idle to say that the inspector general refused to let it be done. He had no control over the coöper, or the cask. The defendant might have taken it away, and returned it properly branded. On this point the justices were also mistaken. The party, to entitle his beef to inspection, should have taken care to have put it in the state required by law. Until that was done, the inspector had nothing to do with it, or with his offers. But if the cask had been properly branded, the inspector had a right, by law, if he thought proper for other reasons, to refuse its inspection, and this is the ground on which we proceed.

There is yet another distinction between this action and those which are generally brought against public officers. The latter are almost always actions for some tort, such as seizing the plaintiff's property, or breaking into his house, or the like; whereas this is an attempt to charge him, not for a sin of commission, but for one of omission. It may well be doubted whether this alone would not justify our deciding it on principles different from those which have heretofore governed, in the cases referred to. But without pursuing this inquiry, our opinion is that an officer, acting under a commission from government, who is enjoined by law to the performance of certain things, if in his judgment or opinion the requisites therein mentioned have been complied with, and inhibited, under the like exercise of his own discretion, from doing other things, who is sworn to discharge these duties to the best of his ability, and exposed also to penalties, as well for negligence as for acting where he ought not, is not answerable to a party, who may conceive himself aggrieved for an omission arising from mistake or mere want of skill, if there be no bad faith, corruption, malice, or some misbehavior, or abuse of power. Nothing of the kind appearing here, the judgment must be reversed.

Judgment of reversal.<sup>11</sup>

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### LINCOLN v. HAPGOOD.

Supreme Judicial Court of Massachusetts, 1814. 11 Mass. 350.

Case against the defendants, for that, when acting and presiding as selectmen of the town of Petersham, at a meeting then duly convened and holden for the election of a representative in May, 1812, they refused the plaintiff's vote there offered, although a qualified voter, entitled to vote in the said election, etc. \* \* \* The refusal of the plaintiff's vote was admitted on the part of the defendants, and the cause was left to the jury, with a direction from the judge to find a verdict for the plaintiff, if his home and residence had been proved to be at Petersham, notwithstanding his occasional absences at Belchertown, and his being permitted to vote there, and actually voting there at the April meetings. And the judge consented to reserve the question of the plaintiff's qualification.

The judge also ruled that evidence of malicious and injurious intentions was not necessary in this case, to entitle the plaintiff to recover damages for the privation of his franchise by the act of the selectmen, if their conduct had not proceeded from an unavoidable mistake of any fact, uncertain in the nature of the proof upon which it depended, but from a mistake of the law, they having undertaken to decide upon the

<sup>11</sup> As to inspectors, see note, 95 Am. St. Rep. 132 (1895); Nickerson v. Thompson, 33 Me. 433 (1851); Gordon v. Livingston, 12 Mo. App. 267 (1882).

As to malice, see Gregory v. Brooks, 37 Conn. 365 (1870); Spalding v. Vilas, 161 U. S. 483, 16 Sup. Ct. 631, 40 L. Ed. 780 (1896).



rights of the plaintiff; and upon this point also the case was reserved by the judge. The jury returned a verdict for the plaintiff, which was taken, subject to the opinion of the court upon the questions so reserved.

PARKER, C. J.: As to the first point reserved for the consideration of the court, we are of opinion that the plaintiff had a legal right to vote in the choice of representatives in Petersham. \* \* \*

But a more difficult question remains, and that is whether the defendants in this case, who are public officers without reward, and upon whom the difficult task is imposed by law of deciding suddenly upon the qualifications of voters, are liable in damages for an error of judgment only, when they have been guilty of no malice, and have exercised an honest and fair judgment upon the question before them? The case does not impute any corrupt motive, or even any negligence in performance of duty, to the defendants. The presumption therefore must be that they erred through ignorance.

This is not a new question with us, although it has never been formally decided by the whole court. In the case of *Gardner v. Ward et al.*, 2 Mass. 244, which is the first action of the kind in this state of which we have a report, no question appears to have been made by the counsel or the court as to the liability of the selectmen if they erroneously decided against the plaintiff's rights, although his vote was rejected in that case upon the ground of his alienage; a point which honest and well-informed men, not lawyers, might determine wrongly with the best possible motives.

In a like case, which occurred the succeeding year in the same county (*Kilham v. Ward*, 2 Mass. 236), we find this objection to the action in the argument of the counsel; but no reply to it from the other side, and no notice taken of it by the court, from which we may infer that it was not much relied on as an important point in the cause.

Since that time, however, actions of this kind having multiplied in all parts of the commonwealth, in consequence of an increased interest in the elections, it has become a matter of serious consideration whether the selectmen of towns, acting fairly in discharge of a duty imposed upon them by law, shall be exposed to actions for a mere mistake of the law, or misapprehension of facts; whether in truth they are not to be viewed as judges, and so entitled to the common privilege of the judicial character, not to be punished, or to be responsible in damages, for any consequence of a judgment merely erroneous.

I confess I have for some time maintained the affirmative upon this question, and have, in one or two instances at nisi prius, given this opinion, reserving a right to the plaintiffs to have the question decided by the whole court. But long reflection upon the subject, and the reasoning of those of my Brethren who have inclined to the opposite opinion, have finally satisfied me that I was mistaken, and that, however hard such an action may be against selectmen, it is essential to the rights of the citizen that it should be sustained.

The right of voting, in such a government as ours, is a valuable right; it is secured by the Constitution; it cannot be infringed without producing an injury to the party; and although the injury is not of a nature to be effectually repaired by a pecuniary compensation, yet there is no other indemnity, which can be had. In such a case, as in the case of an injury to the reputation, and sometimes to the feelings, the good of society, and security against a repetition of the wrong, require that the suffering party should be permitted to resort to this mode of relief.

The selectmen of a town cannot be proceeded against criminally for depriving a citizen of his vote, unless their conduct is the effect of corruption, or some wicked and base motive. If, then, a civil action does not lie against them, the party is deprived of his franchise without any relief, and has no way of establishing his right to any future suffrage. Thus a man may be prevented, for his life, from exercising a constitutional privilege, by the incapacity or inattention of those who are appointed to regulate elections.

The decision of the selectmen is necessarily final and conclusive as to the existing election. No means are known by which the rejected vote may be counted by any other tribunal, so as to have its influence upon the election, or at least no practice of that kind has ever been adopted in this state. There is, therefore, not only an injury to the individual, but to the whole community; the theory of our government requiring that each elective officer shall be appointed by the majority of the votes of all the qualified citizens who choose to exercise their privilege.

Now, if a party duly qualified is unjustly prevented from voting, and yet can maintain no action for so important an injury, unless he is able to prove an ill design in those who obstruct him, he is entirely shut out from a judicial investigation of his right; and succeeding injuries may be founded on one originally committed by mistake. He may thus be perpetually excluded from the common privilege of citizens, without any lawful means of asserting his rights, and restoring himself to the rank of an active citizen. Such a doctrine would be inconsistent with the principles and provisions of our free Constitution, and must give way to the necessity of maintaining the people in their rights, secured to them by the form of their government.

This principle has not been perhaps precisely settled in England, although I apprehend, in the case of *Ashby v. White*, 2 Ld. Raym. 938, the principle upon which this action is to be maintained was fully recognized by Lord Holt, and afterwards by the House of Lords, who reversed the judgment given by the three other judges of the King's Bench, against the opinion of that eminent judge. The argument, upon which that case turned, was that an actual injury had been done, and that it was inconsistent with the character of the English laws that there should be no remedy for a subsisting injury. No question seems to have been made in that cause of malice in the returning officer;

probably none was suggested. But the officer was finally holden to be answerable in an action on the case, on the mere ground that he had refused to receive the vote of a subject, who was entitled to vote. This is exactly the present case, although perhaps we are not authorized to say that malice or fraud, or corruption, was not proved in the case. But it does not appear that any such motive was considered by the judge as influencing the determination.

In a later case, however, of *Drewe v. Coulton*, cited in a note to the case of *Harman v. Tappenden et al.*, 1 East, 563, Mr. Justice Wilson nonsuited a plaintiff in such an action, because it did not appear that the defendants acted maliciously. The nonsuit being acquiesced in by eminent counsel, it is fair to suppose that an action of [on] the case cannot now be maintained in England for rejecting a vote, unless the injury is proved to have been done maliciously.

But in England another remedy exists, which does not exist with us. The electors there all vote *viva voce*. Their names are taken down by the returning officer, as well those whose votes are received as those who are not permitted to vote, and also the name of the candidate for whom they would vote, of which a return is made to the House of Commons. There a revision by a committee takes place; and the rejected vote is counted, and has its effect upon the election, if it was unlawfully rejected. But with us there is no such remedy; and without an action there is no remedy at all, either for the immediate or any subsequent election.

But notwithstanding we deem it necessary that this action should be supported, as the only mode of ascertaining and enforcing a right which has been disputed, we do not think it ought to be a source of speculation to those who may be ready to take advantage of any injury, and turn it to their profit, to the vexation and distress of men, who have unfortunately been obliged to decide on a question sometimes intricate and complicated, but who have discovered no disposition to abuse their power for private purposes. And we therefore think that juries should always, in estimating the damages, have regard to the disposition and temper of mind discoverable in the act complained of; and probably the court would determine that a sum, comparatively not large, would be excessive damages in a case where no fault, but ignorance or mistake, was imputable to the selectmen.

On the other hand, in cases in which it should be apparent that there was a willful deviation from duty, and a wanton rejection of a vote, from party motives, or from personal hostility to the citizen whose vote is refused, or even a negligent or inattentive examination of his claim, exemplary damages would be required, as a compensation to the injured party, and an expiation of the high and aggravated offense against the civil and political privileges of the citizen.

Upon the whole, we see no better way than to leave cases of this kind to the jury, under the direction of the court; nor have we any



doubt that a correct public sentiment will apply the remedy in each case, proportionately to the offense, so that, on one hand, a man who has been, without any fault of his own, deprived of a valuable privilege should find indemnity and protection in the laws, and, on the other, that men who are in places of public trust should not be subject to too severe a penalty for an involuntary failure in a proper performance of their duty.

Judgment on the verdict.<sup>12</sup>

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### JENKINS *v.* WALDRON.

Supreme Court of New York, 1814. 11 Johns. 114, 6 Am. Dec. 359.

In error, on certiorari, from a justice's court. Waldron brought an action on the case against Seth Jenkins, Erastus Pratt, Daniel Clark and William Coventry, the plaintiffs in error, as inspectors of the election held in Hudson, in Columbia county, in April, 1811, for refusing to receive his vote, as an elector, etc.

The plaintiff below stated, in his declaration, that the defendants below were inspectors of the poll in the city of Hudson, at the general election in 1811; that the plaintiff was duly qualified to vote for members of the assembly; that he tendered his vote to the defendants; and that they wickedly and designedly refused his vote, and would not permit him to exercise his right of suffrage, to his damage, etc. The defendants pleaded the general issue.

The following facts appeared in the justice's return, as proved and admitted on the trial before him. The defendants below were duly elected and sworn as inspectors at the general election in 1811, and acted as such when the plaintiff below offered his vote at the poll for members of assembly. The plaintiff is a black or colored man, and at the time he offered his vote he tendered a certified copy of a certificate of his being a free man, under the hand and seal of Samuel Edmonds, one of the judges of the Court of Common Pleas of the county of Columbia, dated 9th April, 1811, which certificate was recorded in the office of the clerk of the town of Livingston, and the copy was certified by the clerk of that town. The plaintiff offered, at the same time, to make any other proof of his qualification to vote that the inspectors might require, and to take the oaths required by law. The defendants below rejected the plaintiff's vote, solely on the ground that Samuel Edmonds, at the time of giving the certificate of freedom, was not a judge according to law, and, therefore, not authorized to give the

<sup>12</sup> See *Kinneen v. Wells*, 144 Mass. 497, 11 N. E. 916, 59 Am. Rep. 105 (1887). Accord: *Jeffries v. Ankeny*, 11 Ohio, 372 (1842): "When we reflect how highly the privilege of voting is generally valued, and that the Legislature has provided and the forms of law admit no other remedy than this action, we unite in the opinion that a necessity exists for entertaining this remedy."

certificate. The inspectors declared they did not require any other proof of the plaintiff's qualification to vote, except a different certificate, or such a one as they should deem legal and valid.

SPENCER, J., delivered the opinion of the court.

It is not necessary to the decision of this cause to pronounce any opinion on the question whether Judge Edmonds was a judge *de jure* or *de facto* when he gave the certificate that the defendant had duly proved himself to be a free man; for, admitting that Judge Edmonds was either, this action, as laid, is not maintainable. It is not alleged or proved that the inspectors fraudulently or maliciously refused to receive Waldron's vote; and this we consider to be absolutely necessary to the maintenance of an action against the inspectors of an election.

The case principally relied on by the counsel for the defendant in error is that of *Ashby v. White*, 2 Ld. Raym. 938. There the declaration alleged that the rejection of Ashby's vote was done fraudulently and maliciously, and, although the jury found the defendant guilty, the judgment was arrested by three judges, in opposition to the opinion of Chief Justice Holt. This judgment was afterwards reversed in the House of Lords. The reasons for the reversal do not appear in the report of the case; but the ground of the reversal is distinctly stated in the resolutions of the Lords, in answer to the resolutions of the Commons, reprehending the bringing the action and the judgment thereon. The first resolution of the Lords states "that by the known laws of this kingdom, every freeholder, or other person having a right to give his vote at the election of members to serve in Parliament, and being willfully denied, or hindered so to do, by the officers who ought to receive the same, may maintain an action in the Queen's courts against such officer, to assert his right, and to recover damages for the injury." 1 Bro. Parl. Cas. (1st Ed.) 49.

The case of *Harman v. Tappenden and Others*, 1 East, 555, and *Drewy v. Coulton*, in a note to that case, clearly show that this action is not maintainable, without stating and proving malice, express or implied, on the part of the officers. In the case in the text, Lawrence, J., said, "There is no instance of an action of that sort maintained for an act arising merely from error of judgment;" and he cited Mr. Justice Wilson's opinion in *Drewy v. Coulton* with approbation. In that case the suit was for refusing the plaintiff's vote. Justice Wilson considered it as an action for misbehavior by a public officer in the discharge of his duty, and that the act must be malicious and willful to render it a misbehavior; and he held that no action would lie for a mistake in law. In speaking of the case of *Ashby v. White*, he considered it as having been determined by the House of Lords on that ground, from the resolutions entered into by them. The whole of Judge Wilson's reasoning is clear, perspicuous and irresistible; and is fully confirmed in *Harman v. Tappenden*. It would, in our opinion, be opposed to all the principles of law, justice and sound policy to hold that officers, called upon to exercise their deliberative judgments, are answerable for a mis-

take in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice.

Judgment reversed.<sup>13</sup>

### WHEELER v. PATTERSON.

Superior Court of Judicature of New Hampshire, 1817. 1 N. H. 88, 8 Am. Dec. 41.

Case against the defendant for illegally and maliciously rejecting the plaintiff's vote for Governor of this state, at a town meeting in Temple, March 12, 1816, the defendant being moderator of the meeting, and the plaintiff legally entitled to vote.

The cause was tried in this county at the last April term upon the general issue, when it was satisfactorily proved that the plaintiff was legally entitled to vote for Governor, and that his vote had been refused by the defendant, who was moderator of the meeting, as alleged in the declaration; but the court directed the jury that they ought not to find a verdict for the plaintiff, unless they believed that the defendant had refused the vote maliciously, and from improper motives, and under this direction the jury returned a verdict for the defendant.

The plaintiff moved the court to grant a new trial on the ground of a misdirection in thus instructing the jury, and the cause was continued to this term for advisement.

RICHARDSON, C. J. It seems that an action of this description cannot be maintained in England, without alleging and proving malice. *Ashby v. White*, 2 L. Raymond, 938; 6 Mod. 45; 1 East, 555, 563, note; 1 Bro. Par. Cas. 49. The law is settled to be the same in New York. *Jenkins et al. v. Waldron*, 11 Johns. 114, 6 Am. Dec. 359. But in Massachusetts it has been solemnly decided to be otherwise, and their courts hold that those who reject the vote of a qualified elector are liable, although not chargeable with malice. *Lincoln v. Hapgood*, 11 Mass. 350. \* \* \*

But, notwithstanding we entertain the most entire respect for the decisions of that court, we have not been able, after the most mature reflection, to adopt their opinion upon this subject. \* \* \*

It is true that moderators may decide wrongly with the best intentions, and then the party will be without remedy. And so may a court and jury decide wrongly, and then the party will also be with-

<sup>13</sup> Accord: *Carter v. Harrison*, 5 Blackf. (Ind.) 138 (1839); *Rail v. Potts*, 8 Humph. (Tenn.) 225 (1847); *Gordon v. Farrar*, 2 Doug. (Mich.) 411 (1847); *Peavey v. Robinson*, 48 N. C. 339 (1856); *Perry v. Reynolds*, 53 Conn. 527, 3 Atl. 555 (1885).

With reference to the case of *Ashby v. White*, 2 Ld. Raym. 938 (1703), see *Campbell's Lives of the Chief Justices*, III, 41-45.

See statute of Illinois (Act Feb. 12, 1849, p. 75, § 20), allowing action on the case for refusal of vote, damages not to exceed \$500, since repealed.



out remedy. Perfect justice in all cases never was and never will be administered in any human tribunal, and yet human tribunals must be intrusted with the ultimate decision upon our most important rights. So long as moderators act honestly and conscientiously, no great injustice will be done, even if they be intrusted to decide finally upon the rights of electors. If those rights, however, shall be found not to be sufficiently secure in the hands of moderators, the Legislature can provide further remedy; but to use the language of the Supreme Court of New York, on this subject, "it would in our opinion be opposed to all the principles of law, justice, and sound policy to hold that officers, called upon to exercise their deliberative judgments are answerable for mistakes in law either civilly or criminally, when their motives are pure and untainted with fraud or malice." 11 Johns. 121.

Judgment on the verdict.

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### GILLESPIE v. PALMER.

Supreme Court of Wisconsin, 1866. 20 Wis. 544.

DOWNER, J. \* \* \* It is contended by the respondents that the complaint is defective because it does not aver malice on their part in rejecting the vote. Chapter 7, Rev. St., prescribes the duties of the respondents as inspectors, and they are, in substance, that it shall be the duty of each inspector to challenge every person offering to vote, whom he shall know or suspect not to be duly qualified as an elector. One of the inspectors may then administer to the person offering to vote an oath that he will truly answer such questions as shall be put to him touching his residence and qualifications as an elector. If the person refuse to take the oath, or to answer any of the questions put to him, his vote is to be rejected; but if he take the oath and answer the questions, however false may be his answers, and however clearly they may show that he has no right to vote, and he still insists upon voting, it is their duty to tender to him the oath prescribed in section 36 of the act,\* and, if he takes it, to receive his vote. If he swears falsely, or votes without the requisite qualifications, he may be, on conviction, punished. But if he takes the oaths, and answers the questions put, there is no discretion with the inspectors. They are mere ministerial officers; certainly far from being judicial. The registry act provides in substance that any one may have his name registered as a voter upon taking the same oaths and giving the same information required for voting.

\* The oath is to the effect that the person is 21 years of age, that he is a citizen of the United States, or has declared his intention, etc., that he has resided in the state one year next preceding the election, that he is a resident of the town or ward as the case may be, that he has not voted at the election, and has not made, or become interested in, any bet or wager depending upon the result of the election.

If the inspectors are mere ministerial officers, then we see no good reason why the general principle of law, that a ministerial officer is liable for a wrong done by him acting in his official character, though without malice, should not be applied. It is held otherwise, however, in England, in New York, and some other states. The reason of these decisions appears to be that the inspectors of elections are intrusted with a discretionary authority, and are quasi judicial officers. In Massachusetts and Ohio it is held the action will lie without malice. *Lincoln v. Hapgood*, 11 Mass. 350; *Blanchard v. Stearns*, 5 Metc. (Mass.) 298; *Harris v. Whitcomb*, 4 Gray (Mass.) 433; *Jeffries v. Ankeny*, 11 Ohio, 373; *Anderson v. Millikin*, 9 Ohio St. 568. Some of these decisions are based partly on the state statute law regulating elections, as being different from the English law, but mainly upon the necessity of protecting the highly valued privilege of voting when the law has provided no other remedy. We adopt the rule of these decisions.<sup>14</sup>

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### McCORD v. HIGH.

Supreme Court of Iowa, 1868. 24 Iowa, 336.

The petition of plaintiff shows that he is the owner of certain lands in Black Hawk county, through which a certain stream of water called Spring creek flows; that the stream, in its natural channel, meanders through plaintiff's land and flows off it near where it enters thereon; that a public highway crosses the stream at its entrance upon plaintiff's land; that defendant, acting as road supervisor, "willfully and maliciously intending to injure the property of plaintiff," erected across said creek, in said highway, a certain obstruction whereby a great portion of the water in said stream was diverted from its natural channel and caused to flow in an artificial channel away from the land of petitioner, which was used as a pasture; that plaintiff, in order to confine said stream to its natural channel, filled up said artificial channel, but the defendant did "willfully, maliciously and fraudulently" cause said artificial channel to be opened, and enlarged the same so that the water would be diverted from the natural channel; that, on account of said obstruction erected by defendant, the greater part of the water is diverted to said artificial channel, which by the action of the water is becoming deeper and wider, and through which, in the course of time, all the water of said stream will flow, unless said obstruction erected by defendant shall be removed. The water, so diverted, does

<sup>14</sup> Accord: *Elbin v. Wilson*, 33 Md. 135 (1870).

As to refusal to perform ministerial duty, see *Amy v. Supervisors*, 11 Wall. 136, 20 L. Ed. 101 (1870), post, p. 454; *Strickfaden v. Zipprick*, 49 Ill. 286 (1868).

not flow at all on plaintiff's land, but re-enters the stream at a point not upon the same.

The defendant sets up as a defense that he was the road supervisor of the district; that "in good faith, and according to his best judgment, he caused said highway to be repaired" in the best manner he was able, with the amount of means at his disposal, "in order to make the same" passable for the public; that no obstruction was erected across said stream by him, and that no diversion was caused in the flow of the stream; and denies the injury complained of by plaintiff. \* \* \*

On motion of defendant, the court instructed the jury as follows, plaintiff excepting thereto: (1) That if the defendant, acting in the discharge of his duties as road supervisor, made the obstruction complained of, he is not liable therefor, unless the act was done maliciously and without probable cause; and that malice must be shown affirmatively. (2) That a public officer is not liable for errors of judgment; that the public have claims upon him, and he is obliged to act, and unless his acts are clearly malicious, and with the intention to injure another, he is not liable therefor.

Under these instructions the jury rendered a verdict for defendant. Plaintiff moved for a new trial on the ground that the law had been incorrectly given to the jury. The motion was overruled, and plaintiff appeals.<sup>15</sup>

DILLON, C. J. I have had in my own mind so much difficulty respecting the main question in this case, viz., the personal responsibility of the road supervisor, that I desire to state briefly why I assent to a reversal of the judgment of the district court. If the act of the supervisor which caused the injury were malicious, I should, of course, entertain no doubt as to his liability.

But the doubt I have had respects his liability for injuries not willfully or maliciously caused by him. That the road supervisor is exempt from liability for certain mistakes of judgment, honestly made in the performance of his official duties, I have no question. If his acts be not strictly judicial, they are in certain cases (as, for example, the kind of a bridge he will build or the requisite capacity of a culvert) in the nature of judicial acts, and rest to some extent upon the same principle. The supervisor is bound to accept his office or be fined. He is bound to exercise his judgment as to the kind of improvements he will make; and this may be influenced by the extent or amount of means or resources at his command. He may not in many cases be able to execute his best thought or judgment. To a certain extent, he must be free to exercise his judgment without being liable to have an action brought against him if his judgment should in a particular case turn out to be faulty.

<sup>15</sup> The opinion of Beck, J., is omitted.



But private rights of property are also to be respected. A very old and just maxim of the law is that, where there is a wrong, there is a remedy. The law recognizes, as is very correctly stated in the opinion of Mr. Justice BECK, as high a right of property in the water course as in the soil. If an individual obstructs or diverts a water course, the injury is actionable. So it is if done by a municipal corporation. Whether the public officers of such corporation, who do the work which occasions the damage in the course of their official duties, are also liable, admits, in my mind, of more doubt.

The injury of which the plaintiff complains is actionable in its character; but against whom shall the action be brought?

It cannot be brought against the road district of which the defendant is supervisor, because, as was settled in *White v. Road District*, 9 Iowa, 202, the road district is not, under our statute, liable to be sued as a quasi corporation or otherwise. For the same reason, it cannot be brought against the township.

And it would seem that under the decisions of this court (*Wilson v. Jefferson Co.*, 13 Iowa, 182; *Brown v. Jefferson Co.*, 16 Iowa, 339; *McCullom v. Black Hawk Co.*, 21 Iowa, 409; *Bell v. Foutch*, 21 Iowa, 129) the bridge or culvert in question, not being built by the county officers or by direction of the county authorities, so far as shown by the record, the county would not be liable for the injury the plaintiff sustained from the obstruction or diversion of the water course.

So, that, although the injury done the plaintiff is a direct invasion of his rights of property, and actionable in its nature, he is without remedy, unless it be against the defendant. In such a case, upon principles of justice, the action should, I think, be held to lie against the public officer.

And the principle involved in this holding, and which, upon the whole, I believe to be sound, is this: That where a public officer, other than a judicial one, does an act directly invasive of the private rights of others, and there is otherwise no remedy for the injury, such officer is personally liable, without proof of malice and an intent to injure. If this is so, the court erred in its instructions to the jury, and its judgment must be reversed.

Whether the supervisor would be liable if the plaintiff had a remedy against the road district, township or county, I give no opinion.

The discretion which protects such an officer as the road supervisor stops at the boundary where the absolute rights of property begin. Suppose the plaintiff had a mill upon the stream, would it do to hold that the road officers could, if they saw fit or judged best, entirely obstruct or essentially diminish the water?

I think not. And this view has the merit of protecting the rights of property without, as I think, placing these officers under any oppressive responsibility. Cases without merit against an officer who

had simply erred in judgment would not meet with any favor from either courts or juries.

Reversed.<sup>16</sup>

<sup>16</sup> Accord: *Beyer v. Tanner*, 29 Ill. 135 (1862). *Tearney v. Smith*, 86 Ill. 391 (1877). But see, *Huey v. Richardson*, 2 Har. (Del.) 206 (1837).

"It was held in *Graves v. Otis*, 2 Hill (N. Y.) 466, that trustees of a village did not acquire jurisdiction to cut down a street when the petition, which the statute required to be signed by a majority of those liable to be assessed for the work, had been altered after it was signed by two of the signers, and made to embrace the sidewalk in question—there was being a majority without the two who signed before the alteration. This alteration might or might not be such as to attract the attention of the trustees; and if it did, they had no means of ascertaining when it was made, except by calling upon each of those signing—a duty which ought not to be imposed upon officers who act without compensation. It was said, if not decided, in *People v. Commissioners of Highways of Seward*, 27 Barb. (N. Y.) 94, that commissioners of highways did not acquire jurisdiction to lay out a highway unless all of the twelve persons signing the petition were freeholders. In this case, again, the statute makes no provision by which the commissioners can ascertain whether the signers are or are not freeholders. The conveyance, if to any one or more of them, may not be on record, or, if on record, may not in law and in fact convey a freehold estate. Is it just that commissioners should be required at their peril to ascertain the nature of the estate of each petitioner? If, in such case, there is a want of jurisdiction, the proceeding should be reversed or annulled. But the officer should not be held to be a trespasser, unless he knows or has reason to know that he is acting without jurisdiction. In other words, the proceedings are assailable for want of jurisdiction in a proceeding brought to review or reverse them, but are not assailable for want of jurisdiction, in an action against the officer, or other collateral proceeding." *Porter v. Purdy*, 29 N. Y. 106, 110, 111, 112, 113, 86 Am. Dec. 283 (1864).

See *Daniels v. Hathaway*, 65 Vt. 247, 254, 26 Atl. 970, 972 (21 L. R. A. 377) (1893): "In view of the fact that selectmen may be required to serve without compensation, their varied and uncertain duties, the duties imposed upon other officers, and the statutes and authorities above cited, it is clear that it is not the duty of selectmen, nor is it intended, that in the performance of their official duties in respect to highways they shall superintend, in person, the construction or repair thereof, or become laborers or operatives thereon. In matters relating to highways they act as a board, and their duties are to a certain extent judicial, or quasi judicial. It is their duty to seek information as to the existence or nonexistence of certain facts, form a judgment, and act accordingly. They are to determine whether other officers have refused or neglected to perform their duty. If they find they have not, it is not their duty to order repairs; but if they find there has been a refusal or neglect on the part of other officers, or an absence of other officers, it is their duty to determine what repairs are necessary, where they are most needed, where the means at their command can be most judiciously expended, what dangers ought to be guarded against, determine whether there are insufficiencies, and, if they find there are, to adopt plans for building or repairing the same, award contracts for the work, or order the same repaired upon the credit of the town. The performance of these duties requires the exercise of judgment, and for the exercise of this judgment, or an omission to exercise such judgment as some other authority may think they ought to have exercised, they are not responsible to an individual. The exercise of these powers is discretionary, to be exercised or withheld according to the judgment of a majority of the board as to what is necessary and proper. Discretionary power is, in its nature, independent, and to make those who wield it liable to be called to account by some other authority is to take away discretion and destroy independence. Discretion to a certain extent implies judicial functions; and when officers act in such a capacity they are not liable to any private person for a neglect to exercise these powers, nor for the consequence of a lawful exercise of them where no corruption or malice can be imputed, and they keep within the scope of their official duties and authority. It is not

## LOWE v. CONROY.

Supreme Court of Wisconsin, 1904. 120 Wis. 151, 97 N. W. 942, 66 L. R. A. 907, 102 Am. St. Rep. 983.

Appeal from circuit court, Clark County.

Action by Jesse Lowe against T. F. Conroy. From a judgment for plaintiff, defendant appeals. Affirmed.

Respondent was engaged in the business of conducting a meat market in the city of Neillsville. Appellant is a physician residing there, and was the city physician and health officer. On August 3, 1901, a steer of respondent's herd of cattle on his farm was found sick from an ailment unknown to him, but supposed to have resulted from drinking water containing paris green. He called Dr. Brown, a veterinary surgeon, who gave the steer an antidote for paris green poisoning, but upon further examination informed respondent he believed the steer was afflicted with anthrax, and that another animal of the herd showed symptoms of anthrax. The steer died about 8 o'clock in the evening of the same day. Respondent and his son flayed him, then buried the carcass, and placed the hide on others in the basement of his meat market. Dr. Roberts, the state veterinarian, arrived at Neillsville the following morning, and with respondent visited the place where the steer had died. Dr. Roberts procured some blood from the spot pointed out by respondent as the place where the steer had been flayed. This specimen of blood was mounted on microscopic slides by appellant's brother, a doctor at Neillsville, who examined it microscopically, and concluded it contained the bacilli of anthrax. The same slide was thereafter examined microscopically by Dr. Russell, the state bacteriologist, who reported to appellant that, so far as could be ascertained from the examination, the specimen disclosed the presence of the bacilli of anthrax. Appellant was absent from Neillsville August 3d and 4th. Dr. Roberts, the state veterinarian, left Neillsville August 4th, giving

enough to charge or show that they omitted to act when they ought to have done so, or that their decisions were erroneous. *Yealy v. Fink*, 43 Pa. 212, 82 Am. Dec. 556; *McConnell v. Dewey*, 5 Neb. 389; *Downer v. Lent*, 6 Cal. 94, 65 Am. Dec. 489; *Waldron v. Berry*, 51 N. H. 136; *Stewart v. Southard*, 17 Ohio, 402, 49 Am. Dec. 463; *Dunlap v. Knapp*, 14 Ohio St. 64, 82 Am. Dec. 468; *Lynn v. Adams*, 2 Ind. 143."

Upon the question of liability for injury resulting from the neglect of official duties, see further, *Hover v. Barkhoof*, 44 N. Y. 113 (1870), liability for defective highway recognized where there are funds for repair; *Bennett v. Whitney*, 94 N. Y. 302 (1884); *Hathaway v. Hinton*, 46 N. C. 243 (1853) (implied recognition by statute); *Skinner v. Morgan*, 21 Ill. App. 209 (1886); *Worden v. Witt*, 4 Idaho, 404, 39 Pac. 1114, 95 Am. St. Rep. 70 (1895), with note, liability denied; 1 *Beven on Negligence* (2d Ed.) p. 398; *South v. Maryland*, 18 How. 396, 15 L. Ed. 433 (1855), sheriff not liable for default as conservator of the peace, because his duty is only to the public. So *State, to Use of Cocking, v. Wade*, 87 Md. 529, 40 Atl. 104, 40 L. R. A. 628 (1893). But see *Asher v. Cabell*, 50 Fed. 818, 1 C. C. A. 693 (1892), and *State of Indiana v. Gobin* (C. C.) 94 Fed. 48 (1899), duty of sheriff toward person specially placed in his custody.



directions to appellant's brother to have the herd quarantined until his return. He returned August 7th, vaccinated the herd supposed to have been exposed, repeated this treatment August 19th, and then ordered the quarantine of the herd and pasture removed. On Monday morning, August 5th, appellant returned to Neillsville, was informed of these occurrences, held a consultation with the mayor of the city and chairman of the city board of health and the city attorney; later in the day received instructions from the secretary of the state board of health to destroy any hides which had been exposed, and disinfect the shop and premises if exposed to anthrax infection. Upon this and other information obtained by appellant he believed the steer died from anthrax, and that respondent's shop and some hides and beef in respondent's slaughter house had been exposed to this dangerous and infectious disease. He issued a written order August 5th, and directed Dr. Brown, as deputy health officer, to serve it on respondent. This order notified and directed respondent to remove the hides from the basement of his premises, and destroy them, and the beef of a heifer which respondent and his son had butchered and prepared for the market on the morning after flaying and burying the diseased steer was also to be destroyed. This heifer was the same animal that Dr. Brown had pointed out to respondent as having symptoms of anthrax. Respondent refused to comply with this order, and thereafter on the same day the hides and beef were burned under the supervision of the city mayor, pursuant to the order of August 5th.

It appears that anthrax is one of the most virulent and deadly diseases known to science, and infectious and epidemic in character to a high degree. Upon the trial the court found that appellant acted in good faith in the discharge of what he deemed his duty as city physician and health officer; that he quarantined respondent's meat market premises; that he had good cause to believe the basement of the premises was a source of filth and sickness; that he ordered the destruction of the hides and beef which he believed had been exposed to the infection, and that this property was of a value of \$239.70. The jury found that the steer was not in fact afflicted with any dangerous and contagious disease, and that appellant had no probable cause to believe that the steer was so afflicted. The court ordered judgment in respondent's favor, and awarded him judgment for the value of the hides and beef and for costs. This is an appeal from that judgment.

SIEBECKER, J. (after stating the facts). The appellant, as a health officer of the city of Neillsville, seeks to justify the destruction of respondent's property upon the authority vested in the board of health for the adoption of such measures to abate nuisances and remove sources of filth and causes of sickness as may be deemed most effectual to preserve the public health. By section 1411, Rev. St. 1898, it is provided that every town, village, and city board of health

"may take such measures and make such rules and regulations as they may deem most effectual for the preservation of the public health. They may appoint as many persons to aid them in the execution of their powers and duties as they may think proper, \* \* \* examine into all nuisances, sources of filth and causes of sickness and make such rules and regulations respecting the same as they may judge necessary for the protection of the public health and safety of the inhabitants." Section 1412, Rev. St. 1898, prescribes as a part of the health officer's duty: "Upon appearance of any dangerous or contagious disease in the territory within the jurisdiction of the board of which he is a member to immediately investigate all the circumstances attendant upon the appearance of such disease," and "at all times promptly to take such measures for the prevention, suppression and control of any such disease as may in his judgment be needful and proper, subject to the approval of the board of which he is a member." By section 1414, Rev. St. 1898, boards of health are given authority to order nuisances and causes of sickness removed from private property by the owner or occupant, and upon his refusal or neglect to comply the board may cause its removal, and recover the expense thereof.

The common council of the city of Neillsville by ordinances adopted these provisions as a part of the regulations for the preservation of the public health, and provided for the organization of the board of health, prescribing the duties of the board and its health officer in carrying out the powers and duties imposed by law. Neither the statutes nor the ordinances of the city for the preservation of the public health make provision for a hearing before the board or otherwise of the person charged with maintaining a nuisance, source of filth, or cause of sickness. The board or its members or officers may abate and remove the nuisance, source of filth, or cause of sickness without any such hearing, even though such proceeding necessitates the destruction of private property.

The statutes were unquestionably framed upon the fact that such boards must act immediately and summarily in cases of the appearance of contagious and malignant diseases, which are liable to spread and become epidemic, causing destruction of human life. Under such circumstances it has been held that the Legislature under the police power can rightfully grant to boards of health authority to employ all necessary means to protect the public health, and, if necessary, go to the extent of destroying private property when the emergency demands. *Bittenhaus v. Johnston*, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380; *City of Salem v. E. Ry. Co.*, 98 Mass. 431, 96 Am. Dec. 650; *Lawton v. Steele*, 119 N. Y. 226, 23 N. E. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813; *Id.*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385.

The power to summarily abate nuisances was fully recognized and established as a principle of the common law, upon the ground

that the requirement of preliminary formal legal proceedings and a judicial trial would result in defeating the beneficial objects sought to be attained. Within this principle, "quarantine and health laws have been enacted from time to time from the organization of state governments, authorizing the summary destruction of imported cargo, clothing, or other articles by officers designated, and no doubt has been suggested as to their constitutionality." *Lawton v. Steele*, supra; *Sentell v. N. O. & C. Ry. Co.*, 166 U. S. 698, 17 Sup. Ct. 693, 41 L. Ed. 1169; *Hart v. Mayor*, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165; *Health Dept. v. Rector*, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579; *Rockwell v. Nearing*, 35 N. Y. 308.

The appearance of a malignant and contagious disease in cattle is in its nature such a menace to the public health as to bring it clearly within the class of cases which can only in many instances be effectually dealt with by the destruction of the animals afflicted.

Respondent insists that he has the legal right to recover his damages since the property was not in fact a nuisance, source of filth, or a cause of sickness, as contemplated by the statute for the preservation and protection of the public health. This presents the inquiry whether the determination of the health officers that a nuisance or cause of sickness dangerous to health in fact existed is a final determination, binding upon respondent as owner of the property which the health officer decided must be destroyed in order to abate the nuisance and remove the cause of sickness.

The statute, as stated, makes no provision giving the party proceeded against for such a nuisance or cause of sickness an opportunity to be heard before his property may be destroyed. While such a determination has been held to be a full protection to all persons acting under it in carrying out the purposes of the law—that is, to abate, and, if necessary, destroy, that which is in fact a nuisance or source of danger to health—yet it is no protection for destroying private property which in fact is no such nuisance or source of danger. This is upon the ground that due process of law requires that the owner be given an opportunity to be heard at a trial before his private property be taken and adjudged forfeited for his misconduct, or for the protection of the public health. He cannot be deprived of the right, either before or after such taking of his property, to have a judicial inquiry whether in fact he has forfeited the right to his property by coming within the condemnation of the law. In such cases, where a board of health has summarily destroyed property, the owner may bring his action to recover the damages sustained, if it be found he has been unjustifiably deprived of it.

In the absence of judicial inquiry wherein the owner is given full opportunity to establish that no nuisance or cause of sickness exists as claimed, the board of health cannot declare a thing a nuisance or source of danger to public health which is not so in fact. Their authority to act is bottomed upon the actual existence of the condi-



tions which the statutes declare they may abate or remove. *Hutton v. City of Camden*, 39 N. J. Law, 122, 23 Am. Rep. 203; *Lawton v. Steele*, supra; *Cole v. Kegler*, 64 Iowa, 59, 19 N. W. 843; *People ex rel. v. Board of Health*, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522; *Health Dept. v. Rector*, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579, and cases; *City of Orlando v. Pragg*, 31 Fla. 111, 12 South. 368, 19 L. R. A. 196, 34 Am. St. Rep. 17.

It is urged that no action can be maintained to charge appellant for the value of the property because in ordering its removal and destruction he was in the exercise of his official duty as city health officer. The laws for the preservation of the public health make no provision for the payment of property so destroyed by mistake on the order of health officers. The question then arises, who is liable for the value of this property under the facts and circumstances of this case?

The jury found that the steer was not afflicted with a contagion, and that the beef and hides destroyed were not infected with anthrax. It is clear that the city is not liable under the decisions of this court. In the case of *Kempster v. City of Milwaukee*, 103 Wis. 421, 79 N. W. 411, it is said: "In carrying out the laws for the preservation of the public health the city is performing a duty which it owes to the whole public as distinguished from a mere corporate duty. It is a duty which it is bound to see performed in pursuance of law as one of the governmental agencies, but not a duty from which it derives special benefit or pecuniary advantage in its corporate or private capacity. *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760, and cases cited."

As here indicated, under the laws of this state no liability on the part of a municipality arises for injuries resulting from the acts or default of its officers while performing a duty imposed upon it as a governmental agency for the public at large. *Durkee v. City of Kenosha*, 59 Wis. 123, 17 N. W. 677, 48 Am. Rep. 480; *Folk v. City of Milwaukee*, 108 Wis. 359, 84 N. W. 420.

Appellant contends that he is not liable in this action upon the ground that the powers vested in members and officers of a board of health are discretionary in character, and that the duty of determining what are causes of sickness affecting the public health are [is] quasi judicial in character. The acts of appellant, as appears from the above statement of facts, were within the scope of his duty as health officer, and come within the class of quasi judicial acts. It is the general rule that such officers are not liable in damages to private persons for injuries which may result from their official action done in the honest exercise of their judgment within the scope of their authority, however erroneous or mistaken that action may be, provided there be an absence of malice or corruption. *Dillon, Municipal Corporations*, § 277, and note; *Steele v. Dunham*, 26 Wis. 393;

*Druecker v. Salomon*, 21 Wis. 621, 94 Am. Dec. 571; *Smith v. Gould*, 61 Wis. 31, 20 N. W. 369; *Gates v. Young*, 82 Wis. 272, 52 N. W. 178.

The facts and circumstances show, however, that respondent's private property rights have been unjustifiably invaded, and that, unless it be that defendant and those who actually committed the trespass in wrongfully destroying his property are liable, he will be remediless in the law. Under such circumstances quasi judicial officers have been held liable to respond in damages upon the ground that the exercise of this discretion is limited by the superior right guarantying to every person immunity from having his private property rights invaded except under the regular course of law, sanctioned by the established customs and usages of the courts. The discretion in which such officers are protected must be limited to the line where their acts invade the private property rights of another, for which invasion the law awards no redress other than an action against the one actually committing the trespass. *Hubbell v. Goodrich*, 37 Wis. 84; *Houston v. State*, 98 Wis. 481, 74 N. W. 111, 42 L. R. A. 39; *Cubit v. O'Dett*, 51 Mich. 347, 16 N. W. 679; *Miller v. Horton*, 152 Mass. 541, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850; *Pearson v. Zehr*, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113; *McCord v. High*, 24 Iowa, 336. The circuit court proceeded upon this principle, and held appellant liable in damages resulting from the destruction of the property, because it was not in fact a nuisance or cause of sickness endangering the public health.

This course is assailed by appellant upon the authority of *Fath v. Koepfel*, 72 Wis. 289, 39 N. W. 539, 7 Am. St. Rep. 867. This was an action against the defendant, as meat inspector of the city of Milwaukee, for the destruction of a quantity of fish as unwholesome for food. The action was upon the ground that his acts were without authority, but the court held that he had authority to inspect fish, and judge whether they were a proper article of diet, and to destroy them if he found they were unwholesome. It is stated in the opinion: "He is vested with the power to determine the quality and healthfulness of fish in the market, and, if unwholesome or unfit to be eaten, to condemn and destroy them. This is a high and responsible judicial power, \* \* \* and the officer exercising such a power is within the protection of that principle that a judicial officer is not responsible in an action for damages to any one for any judgment he may render, however erroneously, negligently, ignorantly, corruptly, or maliciously he may act or render it, if he acts within his jurisdiction"—citing, among the authorities in support of this proposition, *Raymond v. Fish*, 51 Conn. 80, 50 Am. Rep. 3.<sup>17</sup>

<sup>17</sup> In *Raymond v. Fish*, 51 Conn. 80, 99, 50 Am. Rep. 3 (1883), an action to recover damages for the removal of brush with oysters growing on it, brought against persons acting under an order of the board of health, Park, C. J., said: "By the common law a party has the right to defend himself from any assail-

The decision arose on demurrer, and seems to assume that the fish destroyed were in fact unwholesome, and not a fit article of diet. Under this assumption of fact the decision was in accord with the doctrine that health officers are not liable in damages for destroying property when such property is in fact a source of danger to the public health. The opinion, however, seems to go upon the ground that such quasi judicial officers are under all circumstances absolutely protected from liability to the owner of the property, and are entitled to the same protection as an officer of a judicial tribunal in the discharge of official action within his jurisdiction. This is not the rule established under the adjudications. Upon the authorities cited and the reason advanced therein the rule is: "Inasmuch as the law quite universally protects private property, \* \* \* the judgment or discretion of a quasi judicial officer, though exercised honestly and in good faith, does not protect him where, by virtue of it, he undertakes to invade the private property rights of others, to whom no other redress is given than an action against the officer." *Mechem, Public Officers*, § 642, and cases cited. In so far as *Fath v. Koepfel*, supra, is in conflict with this conclusion, it must be deemed overruled. \* \* \*

The evidence adduced fully sustains the findings of the jury. Upon the grounds stated, respondent was entitled to a judgment for the value of the property destroyed.

The judgment of the circuit court is affirmed.<sup>18</sup>

ant, even to the taking of life when necessary, and even to the taking of life when not necessary in fact, but apparently so. If life may be protected by destroying life, when apparently necessary, but not so in fact, may not life be protected by destroying property when apparently necessary, though afterwards discovered not so in fact? But it may be said that this right of self-defense comes when the assailed party seems to be driven to the last extremity. So here the justification of the board of health in the destruction of property must come in seemingly extreme cases, where there is reasonable ground to believe that immediate action is necessary for the preservation of the life and health of the inhabitants, and where there is reasonable ground to believe the supposed nuisance to be one in fact. We go no farther in this case than its exigencies require. We leave undecided how far the board of health may go in other cases, where the destruction of property may not seem to require such summary action. It is expressly found in the case that the board acted in good faith throughout these transactions, and in addition thereto such facts are detailed as go to show that they acted with extreme caution. We cannot doubt the constitutionality of the act when rightly considered. It is nothing more or less than a police regulation. The property was not taken for public use within the meaning of the Constitution. It was destroyed for the protection of the public health. \* \* \* We advise judgment for the defendants."

See *Whidden v. Cheever*, 69 N. H. 142, 44 Atl. 908, 76 Am. St. Rep. 154 (1897).

<sup>18</sup> See, also, *Underwood v. Green*, 42 N. Y. 140 (1870); *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850 (1891).

New York Agricultural Law (1901) § 70a: "The actual appraised value \* \* \* of all animals slaughtered under the provisions of this article [Diseases of Domestic Animals], which shall be found upon a post mortem examination not to have had the disease for which they were slaughtered, unless the same were killed on account of the violation of quarantine regulations, shall be paid to the owners of such animals. \* \* \*"

See New York City Charter 1901 (Laws 1901, c. 466) § 1196, post, p. 402.



## WILLIAMS v. RIVENBURG.

Supreme Court of New York, Appellate Division, Fourth Department, 1911.  
145 App. Div. 93, 129 N. Y. S. 473.

SPRING, J. The action is in conversion to recover damages of the defendant by reason of the killing of five calves owned by the plaintiff, and involves the construction of section 106 of the Agricultural Law. 1 Consolidated Laws of 1909, c. 1. The defendant is the agent of the state commissioner of agriculture, representing that official in the city of New York, and the acts complained of were done by him in pursuance to the general instructions given to him by the head of the department.

The complaint alleges two causes of action, and they will be considered in their order.

1. The plaintiff, a cattle shipper, purchased at Rome, N. Y., and shipped by rail to the Union Stockyards, New York City, on the 27th day of April, 1908, one calf, in company with other calves, all consigned to him. Upon their arrival at the point of destination on the 29th of April, the calves were placed in a pen in the stockyards in which calves were kept for sale. On April 29th the defendant, in the performance of his duties as an agent of the commissioner of agriculture, examined the calves in the stockyards and seized seven on the ground that they were each under four weeks of age, and they were subsequently taken to an abattoir and killed. There were other inspectors with the defendant at the time, and a state veterinary surgeon of wide experience also examined these calves at the stockyard and again after they were killed, and he testified the plaintiff's calf was under four weeks of age, and his testimony was corroborated by all the inspectors. The farmer who raised the calf testified that he was born March 28th, more than four weeks before he was seized by the defendant.

Section 106 of the Agricultural Law, so far as pertinent to this alleged cause of action, in prohibiting the bringing into a city or village of a calf for the purpose of selling the same, provides:

"Unless it is in a good healthy condition, and no person or persons shall bring any such calf or carcass of the same or any part thereof except the hide into any city, town or village, for the purpose of selling, offering or exposing the same for sale, unless the calf is four weeks of age."

And, further, the act provides:

"Any person or persons duly authorized by the Commissioner of Agriculture may examine any calf or veal offered or exposed for sale or kept with any stock of goods apparently exposed for sale and if such calf is under four weeks of age, or the veal is from a calf killed under four weeks of age, or from a calf in an unhealthy condition when killed, he may seize the same and cause it to be destroyed and dis-

posed of in such manner as to make it impossible to be thereafter used for food."

The defendant claims that he was authorized to take and kill the calf by the commissioner of agriculture, and his authority to represent that officer is not impugned.

In this case there was a question of fact as to the age of the calf, and, as the plaintiff was nonsuited, he is entitled on this appeal to the interpretation of the evidence most favorable to him. We must start, therefore, with the assumption that the calf was over four weeks of age at the time of its seizure by the defendant. The appearances indicated that it was less than four weeks old. It was undersized. One hip was marked with shears, so that in the event it was appropriated by the state authorities it could be identified and traced to the farmer of whom it was purchased. The flesh was flabby and immature, and, if we were considering the weight of the evidence, we might well be justified in concluding that the calf was under four weeks old in spite of the explicit testimony of the farmer who owned its dam at the time the calf was born.

The statute, however, fixes arbitrarily the minimum age at which a healthy calf may be sold or exposed for sale at four weeks. One calf only three weeks old may be well nourished and fattened and of good size, while another of six weeks of age may be scantily fed, poorly nurtured, undersized, and scrawny. The larger one may be seized in pursuance of the authority given by the statute in question, while the smaller one may be exempt from seizure. It is often necessary in promulgating laws for the benefit of the public health, or to conserve any other utilitarian purpose, to establish inflexible standards. Milk containing more than 88 per centum of water or fluids comes within the arbitrary definition of adulterated milk. Milk containing 89 per centum of water may be more wholesome in a particular batch than that of another quantity one per centum below the standard. One batch is within the condemnation of the statute, the other not. The fixing of the inflexible standard is the result of tests and examinations extensively made, and is adopted as a fairly just rule for milk generally, although in individual cases the enforcement of the law may occasionally operate unjustly.

No compensation is provided for to the owner of the calf seized, and the seizure is an invasion of his property rights, and can only be supported because the enactment is in the interest of public health and a justifiable police regulation. The exercise of the right must, therefore, be within the letter of the statute. There is no discretion permitted. The inflexible requirement is that the calf offered for sale must be four weeks of age, and, if under that limit, it may be seized. There is no authority to determine the age from the appearance of the animal. The statute does not provide if it is actually or apparently under four weeks of age that it may be seized, but the language is precise, explicit, "under four weeks of age," and the official who seizes

a calf in pursuance of the authority of this statute must be certain that the calf comes within its condemnation. The examination made, the appearance of the calf, and other circumstances may be competent in order to fortify the evidence of age, and, if the weight of evidence was reviewable on this appeal, it might not be difficult to decide that the preponderance was with the defendant on that subject.

I think the defendant was not within the compass of his authority in seizing this calf, provided it was over four weeks of age, as we must assume. The Legislature might have vested the authority to seize if the animal is actually or apparently under four weeks of age, and in that event the agent of the commissioner of agriculture acting in good faith might be exonerated of liability, even though the calf exceeded the age limit. The power to prescribe when private property may be taken or destroyed without compensation because it is deleterious to public health is lodged with the Legislature, and the courts cannot enlarge the scope of that authority. There is no claim that the calf was unhealthy. It was immature and the flesh flabby and stringy, but it was not diseased. The "good healthy condition" referred to in the statute is a condition apart from that of age and signifies disease or some defect rendering the meat deleterious to the health of persons eating it. The calf was not taken, and the case was not defended on that ground, but because the animal was under four weeks of age. I think the nonsuit as to the first cause of action was error.

2. The second cause of action grows out of the seizure of four calves by the defendant in the Union Stockyards and which were indisputably under four weeks of age. On the 30th of January, 1909, the plaintiff, at Lowville, Lewis county, consigned to himself at the Union Stockyards in New York City 85 or 90 calves and 4 fresh milch cows, and with each cow was its calf, and they were from 10 days to 2 weeks old. When they arrived at the stockyards, all the calves, including these four, were placed in a pen together, and where calves were to be sold and exposed for sale. They arrived on Sunday, and on that day the defendant, with other agents, examined a large number of calves, and among others, seized these four of the plaintiff's, and they were subsequently carted to the slaughterhouse and killed. Section 106 of the Agricultural Law contains this clause:

"Any person or persons exposing for sale, selling or shipping any calf or carcass of the same will be presumed to be so exposing, selling or shipping the said calf or carcass of the same for food."

The shipment of these calves and herding them with a large number which were to be sold for food established the presumption that these four were to be exposed for sale for a like purpose. The statute empowering the agent of the commissioner of agriculture provides that he may examine any calf offered for sale "or kept with any stock of goods apparently exposed for sale," and, if the calf was under four weeks of age, may seize and cause it to be destroyed. The defendant when he found these four immature calves obviously under four



weeks of age collected with a large number in a sales pen was called upon to take prompt action, otherwise they might be sold with the others. As they were kept with a stock of calves "apparently exposed for sale," he was within the strict letter of the statute in seizing them as he did.

The plaintiff seeks to find shelter in the clause of the statute which reads that if a calf is shipped "for the purpose of being raised, if said calf is under four weeks of age, shall ship it in a crate, unless said calf is accompanied by its dam." This clause relates to the shipment, and does not apply where the dam and calves after having reached the shipping destination are separated, and the calves are put in with a large number of others which are to be sold for food. The plaintiff was not present when this separation was made. The defendant, however, was in the line of his duty to prevent the sale of the calves under the prescribed age, and he was not called upon to ascertain the motives which induced the collection of these calves in the sales pen, or whether they were placed there by the authority of the plaintiff. The agent was confronted with a condition requiring the exercise of his authority, and he was warranted from what he saw in seizing these animals for destruction. That evening the plaintiff came to the stockyards, and, after informing the agent that the calves were to be sold with their dams, importuned him to let them go to their mothers. The defendant did not see fit to rely upon the statements of the plaintiff to overcome the presumption arising from the herding of these calves in a pen where calves for sale were accustomed to be gathered, as the defendant knew. In this determination he exercised his discretion upon the facts and circumstances as they were presented to him, and which justified the course he pursued.

Sunday was not sales day, and the plaintiff claims for that reason the calves were not exposed for sale. The evidence shows that, while the stockyards are prohibited from being open for sales on that day, sales in fact were made on Sunday to butchers and others known to the men in charge of the stockyards. The defendant was not obliged to remain there until after midnight in order to keep track of these calves. Long experience in the examination of calves and other animals at these stockyards made him cognizant of the practices prevailing and the necessity for prompt decision and action in order to prevent the sale of animals within the condemnation of the law. I think the court was right in granting the nonsuit as to this cause of action.

3. There is no allegation in the complaint and no claim that the defendant in seizing these calves to be destroyed acted maliciously or in bad faith. He was endeavoring to perform his official duties honestly and fairly, as he understood them. The complaint is an ordinary action in conversion, charging that the defendant "wrongfully and unlawfully and without any right or authority seized" and converted the said property, and in the second cause of action the damage claimed is to the milch cows which were alleged to be of less value because the

calves, their offspring, had been taken from them. In so far as the seizure by the defendant was within the letter of the statute, he is not personally liable to an action for damages.

Laws enacted in pursuance of police power to abate nuisances or to benefit the health of the public which may result in the destruction of private property, and which do not provide for any payment therefor to the owner, are not violative of the constitutional inhibition against taking private property for a public use without compensation. *Health Department v. Rector, etc.*, 145 N. Y. 32, 43, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579; *Mugler v. Kansas*, 132 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205; *Lawton et al. v. Steele*, 119 N. Y. 226, 23 N. E. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813. The abatement of a nuisance or its regulation is within the scope of legislative authority, and we would not expect the act in terms to authorize the annihilation of property. In effectuating the primary purpose of the power conferred to get rid of the nuisance or offense against public health, private property may be incidentally destroyed or its value impaired, and yet it is not an appropriation in the sense of infringing upon the constitutional guaranty assuring immunity to the owner of property against its taking for a public use.

Before an officer can justify any such invasion of private property, the legislative authority must be clear and unequivocal, and he must keep strictly within the power conferred. *People ex rel. Copcutt v. Board of Health*, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522; *Underwood v. Green*, 42 N. Y. 140; *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850; *Litchfield v. Bond*, 186 N. Y. 66, 74, 78 N. E. 719; *Lowe v. Conroy*, 120 Wis. 151, 97 N. W. 942, 66 L. R. A. 907, 102 Am. St. Rep. 983.

In the first case cited, the board of health of the city of Yonkers passed an ordinance declaring certain dams within the municipality nuisances, and directing their abatement. Their authority was challenged, and it developed, in fact, that the dams were not nuisances, and the board's actions were reviewed by certiorari. The court in considering the finality of the determination of the board used this expressive language at page 8 of 140 N. Y., page 322 of 35 N. E. (23 L. R. A. 481, 37 Am. St. Rep. 522):

"It may be said that, if the determination of a board of health as to a nuisance be not final and conclusive, then the members of the board, and all persons acting under their authority in abating the alleged nuisance, act at their peril; and so they do, and no other view of the law would give adequate protection to private rights. They should not destroy property as a nuisance unless they know it to be such, and, if there be any doubt whether it be a nuisance or not, the board should proceed by action to restrain or abate the nuisance, and thus have the protection of a judgment for what it may do."

In the state of Massachusetts there was a statute in force author-

izing the summary killing of an animal afflicted with the glanders or farcy, and there was no provision for compensation to the owner. The commissioners on contagious diseases of animals examined, or caused to be examined, a horse owned by the plaintiff and decided the animal was afflicted with this contagious disease, condemned it, and formally recited the facts in a written notice to the board of health of the village where the owner of the horse lived, and directed the owner "to cause it to be killed forthwith," which was done. Subsequent investigation disclosed that the horse was not afflicted with the glanders, and the members of the board were held individually liable for the value of the horse killed. *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850, *supra*.

There is a wide divergence in the authorities of the various state jurisdictions on this question, many holding that the officials are not liable individually or in their official capacity for errors of judgment of the kind stated. The weight of authority, however, seems to be the other way. I therefore think that in directing the killing of the calf, which the evidence most favorably viewed for the plaintiff shows was over four weeks of age, the defendant exceeded his authority and is individually liable for the value thereof, and the nonsuit was error. The judgment and order should be reversed.

Judgment and order reversed, and new trial granted, with costs to the appellant to abide event. All concur, except

McLENNAN, P. J. (dissenting). I agree with the majority of the court in holding that a nonsuit was properly granted as to the second cause of action alleged in the complaint for the reasons stated in the opinion of Justice SPRING, but I dissent from the holding that the trial court improperly granted a nonsuit as to the first alleged cause of action, because, in my opinion, the defendant incurred no individual liability for the acts done by him in the premises, and so notwithstanding upon the evidence it was a question of fact as to whether the calf seized by defendant and killed was more than four weeks of age. The defendant at the time he seized such calf was not an officer of the state. He was the mere agent of the commissioner of agriculture, and whatever he did in the premises was done under the direction and under instructions given him by the commissioner. Under such circumstances, I think the defendant was not personally liable for such acts, but that, if the plaintiff had a cause of action because of the alleged illegal seizure of his calf, the action should have been brought directly against the commissioner of agriculture or in the Court of Claims against the state. *Wright v. Eldred*, 46 Hun, 12, affirmed 137 N. Y. 556, 33 N. E. 337; *Shaver v. Eldred*, 114 N. Y. 236, 21 N. E. 411. In the *Wright Case*, *supra*, the action was brought to recover for injury to the plaintiff's premises, alleged to have been caused by the act of the defendant in setting water back on to them. The defendant attempted to justify his action by producing a letter written by the assistant superintendent and approved by the superintendent of pub-



lic works, authorizing him to do the acts complained of, and it was held that the defendant was not personally liable for the acts thus done by him. Judge Bradley, in writing the opinion of the General Term, at the bottom of page 17 of 46 Hun, summed up the whole matter as follows:

"The defendant did no more, and he may be deemed to have legitimately acted under the authority and direction of the superintendent of public works, and therefore incurred no personal liability."

One of the earliest cases bearing upon this subject is *Waggoner v. Jermaine*, 7 Hill, 357. The headnote in that case is as follows:

"The canal commissioners, under the act for the construction of the Crooked Lake Canal, caused surveys, etc., to be made, and then adopted a plan as required by the act, preliminary to commencing the work; but the plan had no reference to the defendants' dam, standing at the outlet of the lake. Afterward, however, the commissioners, by way of substitute for certain regulating gates contemplated by the plan, permitted the defendants to increase the height of their dam 10 inches in order to effect the same object for which the gates were designed; and thereby the plaintiff's lands lying above the dam were injured. Held, that no action lay against the defendants for the injury; they having acted under the authority of the commissioners."

The case of *Litchfield v. Bond*, 186 N. Y. 66, 78 N. E. 719, cited by appellant's counsel, is not in conflict with the cases above cited. That action was brought directly against the state engineer and surveyor and officers of the state, and it was held, in effect, that the state could not commit a trespass, and, the action of its officers being contrary to law, they were responsible individually. To the same effect is *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713.

But in the case at bar the commissioner of agriculture was the public officer and the defendant his mere agent, and acting solely, as the evidence shows, under his employment and direction, and he did solely and only as he was directed. This is uncontradicted in the case. Hence the defendant was not liable, and the action, if a cause of action existed in plaintiff's favor, should have been brought directly against the commissioner of agriculture. Unless compelled so to do by authority, we ought not to hold that a mere agent, employed by and acting directly under the authority, employment, and direction of the commissioner of agriculture, a public officer charged with the duty of the enforcement of the pure food laws, so called, is personally liable for acts done by him in carrying out such directions. Such rule, if adopted, would make it extremely difficult to procure agents who would carry out his instructions if, in case the instructions were wrong, such agent was personally liable for acts done in pursuance thereof.

In the case at bar all reasonable means were taken to ascertain whether or not the calf in question was under four weeks of age. The witness Hulbert, who was plaintiff's agent in purchasing the calf and who claimed to have marked this calf, testified on cross-examination:

"I marked the calf because it was a light calf, and I thought it might be seized in New York."

Another witness called by the plaintiff and in his employ testified: "I marked whatever calves were marked because they were small, and because I was afraid they would be seized in New York."

Another witness called by the plaintiff testified: "The calf was a small dark calf. \* \* \* From his appearance I should think the calf was about three weeks old."

The defendant testified that the calf was under four weeks old. One of defendant's witnesses, Harry D. Gill, one of the state veterinarians, and a man of great skill and experience, testified "the calf was under three weeks of age." Inspector Clark stated that the calf was under four weeks of age.

Having the opinions of all these witnesses, the defendant seized the calf and caused it to be killed, as it was his duty to do, under the directions given him by the commissioner of agriculture. If under such circumstances the inspector, the defendant in this case, must permit such calf to be sold as food in the city of New York, or take the responsibility of having a personal action brought against him for a tort in case the assertion of the plaintiff or of some other witness is believed by a jury that the calf was more than four weeks of age, we may not expect such inspector to take the chances of such a litigation against him, but he will allow the citizens of New York City to continue to eat bob veal.

The judgment appealed from should be affirmed, with costs.

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## SECTION 29.—LIABILITY ON OFFICIAL BOND

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### UNITED STATES v. GRISWOLD et al.

Supreme Court of Arizona, 1904. 8 Ariz. 543, 76 Pac. 596.

Action by the United States of America against Albert J. Griswold and others. From an order sustaining a demurrer to the complaints, plaintiff appeals. Reversed.

SLOAN, J. The United States brought suit in the court below against Albert J. Griswold, postmaster at Nogales, Ariz., and L. W. Mix, Edward Titcomb, Theo. Gebler, and Fred. Herrera, sureties upon the official bond of said Griswold as postmaster aforesaid, to recover the sum of \$1,863, alleged to have been lost from the mails after the same had been registered and deposited in the post office at Nogales by P. Sandoval & Co. It was alleged in the complaint that the registered package containing this money was stolen from the post office by reason of the negligence of the postmaster,

The defendants in the action demurred to the complaint upon the ground that the facts therein stated did not constitute a cause of action in favor of plaintiff and against the defendants. The demurrer was sustained by the trial court, and from this order and ruling of the court the United States has appealed.

The first question presented is: Does the loss of the registered package, occasioned by the negligence of the postmaster, amount to a breach of the bond given by such postmaster, under section 3834, Rev. St. U. S. (U. S. Comp. St. 1901, p. 2610)? This section provides that "every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such penalty as the Postmaster General shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department." The bond in this instance, given by Griswold, contained the condition required by said section, being in all respects as required by law and the rules and regulations of the Post-Office Department having the effect of law. Section 3926, Rev. St. U. S. (U. S. Comp. St. 1901, p. 2685), authorizes the Postmaster General to establish a uniform system of registration conditioned that the Post-Office Department, or its revenue, should not be liable for the loss of any mail matter on account of its having been registered. It is a part of the duty of the postmaster to safely keep and to transmit the mails, including registered packages, which may be given into his hands as such postmaster. His oath of office requires him to faithfully perform the duties of his office.

It is a general proposition that a public officer, having ministerial duties to perform, is liable for any injury occasioned by him in consequence of his failure to perform his official duty. *Raynsford v. Phelps*, 43 Mich. 344, 5 N. W. 403, 38 Am. Rep. 189. Thus it has been held that a postmaster is liable in damage for conversion of mail matter at the suit of the person injured. *Teal v. Felton*, 12 How. 284, 13 L. Ed. 990. It has also been held that a postmaster is liable for the loss of a letter containing money, occasioned by his negligence, at the suit of the sender. *Danforth v. Grant*, 14 Vt. 283, 39 Am. Dec. 224. If a postmaster can be held responsible in damages for loss of mail matter occasioned by his negligence, it must be for the reason that he has been derelict in his duty as such officer. Such a failure, under the condition of his official bond that he will "faithfully discharge the duties of his office," amounts to a breach of the bond; and in such a case the liability of the principal is the measure of the liability of the surety. All bonds given by government officials are to be construed as though executed and to be performed at Washington, and hence are to be construed according to the rules of the common law, except where these rules have been changed or modified by statute. *Cox v. United States*, 31 U. S. 172, 8 L. Ed. 359.



At common law suit upon an official bond must be brought and a recovery had in the name of the obligee. There is no congressional statute modifying the common-law limiting the liability of sureties to suits brought by or in the name of the United States, as there is in the case of bonds given by United States marshals. In the latter case there is statutory authority authorizing any person to bring, in his own name and for his sole use, suit on the marshal's bond for a breach of its conditions. Section 784, Rev. St. U. S. (U. S. Comp. St. 1901, p. 607). It follows, therefore, that P. Sandoval & Co. could not maintain a suit on the postmaster's bond in their own name to recover for the loss of the registered package.

Can the United States maintain such a suit? It has been held that a bailee may sue and recover in his own name damages caused to the subject of the bailment through the negligence of a third person. In such case the measure of damages is not limited to the bailee's special interest in the property, but he may recover for all damages, holding the amount so recovered in excess of his own interest in trust for his bailor. *Woodman v. Nottingham*, 49 N. H. 387, 6 Am. Rep. 526; *McGill v. Monette*, 37 Ala. 49; *Rindge v. Coleraine*, 11 Gray, 159. The United States, in this instance, was the bailee and intrusted with the safe-keeping of the registered package deposited by P. Sandoval & Co. Under section 3926, Rev. St. U. S. (U. S. Comp. St. 1901, p. 2685), the sender of first-class registered matter is entitled to be indemnified out of the postal revenues for loss in the mails to the extent of \$10 for any one registered package, or the actual value thereof when that is less than \$10. The government, in accepting a registered package, becomes not only the bailee of the sender, but assumes a liability to its bailor by reason of the bailment.

Even should we therefore construe the liability of the sureties in its strictest sense, the government, as a bailee, would have a right to recover to the extent of its special interest, which would be measured by the extent of its liability to the sender of the package. If the government, therefore, has a right to sue to recover the loss it sustains as bailee, under the general doctrine above stated, its recovery cannot be confined to such special interest, but may cover the entire loss sustained both by it and its bailor. Not only so, but we think it is the duty of the United States to protect the public against its own officers even to the extent of enforcing every legal right which it possesses, whether criminal or civil. To hold that the United States may not maintain an action upon the bond of the postmaster for the recovery of the entire loss sustained by the negligence of the postmaster because it was not obligated to return or make good to P. Sandoval & Co. an amount exceeding \$10, would be to deny to the latter any redress unless the postmaster be personally responsible to the extent of such loss.

We are convinced that in a case like the one at bar the United States may sue for the benefit of the injured party and recover from

the sureties upon the official bond of the postmaster the full amount of such loss, and that it is the clear duty of the government to bring such action. At common law such suits were usually brought "for the use of" or "at the relation of" the injured person. It is not essential, however, that there be any formal declaration of such use; its only purpose being to protect the interest of the beneficiary against the nominal plaintiff. *Tedrick v. Wells*, 152 Ill. 217, 38 N. E. 625; *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 31 Mich. 346. In the complaint the facts sufficiently show that the United States is suing for the amount of the loss suffered by P. Sandoval & Co. and for their benefit, and it will not be assumed that the government will appropriate the amount recovered to its own use, but it will be assumed that it will perform its duty by paying to P. Sandoval & Co. the amount so recovered.

We hold that the complaint stated a cause of action, and the judgment will therefore be reversed, and the cause remanded for further proceedings.<sup>19</sup>

KENT, C. J., and DOAN, J., concur.

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## SECTION 30.—ACTIONS AGAINST SUBORDINATES

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### LITTLE v. BARREME.

#### THE FLYING FISH.

Supreme Court of United States, 1804. 2 Cranch, 170, 2 L. Ed. 243.

Appeal from the Circuit Court for the District of Massachusetts.  
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MARSHALL, C. J., now delivered the opinion of the court.

The Flying Fish, a Danish vessel, having on board Danish and neutral property, was captured on the 2d of December, 1799, on a voyage from Jeremie to St. Thomas, by the United States frigate Boston, commanded by Captain Little, and brought into the port of Boston, where she was libeled as an American vessel that had violated the nonintercourse law. The judge before whom the cause was tried directed a restoration of the vessel and cargo as neutral property, but refused to award damages for the capture and detention, because, in his opinion, there was probable cause to suspect the vessel to be American. On an appeal to the Circuit Court, this sentence was reversed, because the Flying Fish was on a voyage

<sup>19</sup> See *Howard v. United States*, 184 U. S. 676, 687, 690, 22 Sup. Ct. 543, 46 L. Ed. 754 (1902).

from, not to, a French port, and was, therefore, had she even been an American vessel, not liable to capture on the high seas.

During the hostilities between the United States and France, an act for the suspension of all intercourse between the two nations was annually passed. That under which the Flying Fish was condemned declared every vessel owned, hired, or employed, wholly or in part, by an American, which should be employed in any traffic or commerce with or for any person resident within the jurisdiction, or under the authority, of the French republic, to be forfeited, together with her cargo, the one-half to accrue to the United States, and the other to any person or persons, citizens of the United States, who will inform and prosecute for the same. The fifth section of this act authorizes the President of the United States to instruct the commanders of armed vessels to stop and examine any ship or vessel of the United States, on the high seas, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor of the act, and if upon examination it should appear that such ship or vessel is bound, or sailing to, any port or place within the territory of the French republic or her dependencies, it is rendered lawful to seize such vessel, and send her into the United States for adjudication.

It is by no means clear, that the President of the United States, whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States to seize and send into port for adjudication American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that the general clause of the first section of the act, which declares that "such vessels may be seized, and may be prosecuted in any District or Circuit Court, which shall be holden within or for the district where the seizure shall be made," obviously contemplates a seizure within the United States, and that the fifth section gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound, or sailing to, a French port, the Legislature seem to have prescribed that the manner in which this law shall be carried into execution was to exclude a seizure of any vessel not bound to a French port. Of consequence, however strong the circumstances might be which induced Captain Little to suspect the Flying Fish to be an American vessel, they could not excuse the detention of her, since he would not have been authorized to detain her, had she been really American.

It was so obvious, that if only vessels sailing to a French port could be seized on the high seas, that the law would be very often evaded, that this act of Congress appears to have received a different construction from the executive of the United States—a construction much better calculated to give it effect. A copy of this act was



transmitted by the Secretary of the Navy to the captains of the armed vessels, who were ordered to consider the fifth section as a part of their instructions. The same letter contained the following clause: "A proper discharge of the important duties enjoined on you, arising out of this act, will require the exercise of a sound and an impartial judgment. You are not only to do all that in you lies to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France or her dependencies, where the vessels are apparently as well as really American, and protected by American papers only, but you are to be vigilant that vessels or cargoes, really American, but covered by Danish or other foreign papers, and bound to or from French ports, do not escape you."

These orders, given by the executive, under the construction of the act of Congress made by the department to which its execution was assigned, enjoin the seizure of American vessels sailing from a French port. Is the officer who obeys them liable for damages sustained by this misconstruction of the act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him; if they excuse an act, not otherwise excusable, it would then be necessary to inquire whether this is a case in which the probable cause which existed to induce a suspicion that the vessel was American would excuse the captor from damages when the vessel appeared in fact to be neutral?

I confess the first bias of my mind was very strong in favor of the opinion that, though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers, and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which, in general, requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my Brethren, which is that the instructions cannot change the nature of the transaction, nor legalize an act which, without those instructions, would have been a plain trespass.

It becomes, therefore, unnecessary to inquire whether the probable cause afforded by the conduct of the Flying Fish to suspect her of being an American would excuse Captain Little from damages for having seized and sent her into port, since, had she been an American, the seizure would have been unlawful. Captain Little, then, must be answerable in damages to the owner of this neutral vessel, and as the account taken by order of the Circuit Court is not objectionable on its face, and has not been excepted to by counsel before the proper tribunal, this court can receive no objection to it.

There appears, then, to be no error in the judgment of the Circuit Court, and it must be affirmed, with costs.<sup>20</sup>

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### STETSON v. KEMPTON.

Supreme Judicial Court of Massachusetts, 1816. 13 Mass. 272, 7 Am. Dec. 145.

Trespass against the defendants, for taking and carrying away the plaintiff's chaise and harness, and converting them to their own use. The plaintiff had died since the last continuance; and upon motion of his administrator, he was admitted to prosecute the suit, the defendants opposing. The cause was submitted to the determination of the court, upon an agreed statement of facts, in substance as follows:

The defendants were duly chosen and qualified as assessors for the town of Fairhaven for the year 1814, and on the 8th day of October in that year, in pursuance of the duties of their office, assessed upon the inhabitants of said town a tax, amounting in the whole to the sum of \$3,719.73, of which sum the plaintiff, being a taxable inhabitant of the town, was assessed the sum of \$14.91, for the nonpayment of which tax his chaise and harness were seized and sold by the collector, to whom the said assessment had been committed, and who was duly qualified to execute the duties of that office, the surplus of the proceeds of the sale, over the tax and legal charges, having been paid to the plaintiff.

Of the said sum of \$3,719.73, the sum of \$1,200 was, at a legal meeting of the inhabitants of said town holden on the 2d of August, 1814, voted to be raised "for the payment of additional wages allowed the drafted and enlisted militia of said town, and other expenditures of defense." At the time when the said sum of \$1,200 was so voted to be raised, and when the same was assessed as aforesaid, an open war existed between the United States and Great Britain. The enemy were then on the coast, and in sight of said town; and had

<sup>20</sup> See *Otis v. Bacon*, 7 Cranch, 589, 3 L. Ed. 448 (1813); *Tracy v. Swartwout*, 10 Pet. 80, 9 L. Ed. 354 (1836); *Hendricks v. Gonzalez*, 67 Fed. 351, 14 C. C. A. 659 (1895); *Herlihy v. Donohue*, 52 Mont. 601, 161 P. 164, L. R. A. 1917B, 702, Ann. Cas. 1917C, 29 (1916); *Hatfield v. Graham*, 73 W. Va. 759, page 773, 81 S. E. 533, 538, L. R. A. 1915A, 175, Ann. Cas. 1917C, 1 (1914).

made an attempt to land, but retreated. The town was greatly and eminently exposed to their ravages, who were then laying waste and destroying the dwellings and other property of the people situated on the coast; and in the opinion of the inhabitants of the town, it was necessary to raise and expend the said sum of money for the purposes expressed in the vote above recited, and for the immediate protection and defense of the inhabitants of the town, who voted unanimously to raise the same for the said purposes, the plaintiff himself not having been present at said meeting. Not one-half of the said \$1,200 was in fact expended for the object stated in the said vote; and the residue, so far as collected, has been applied to the legal and necessary expenses and uses of the town.

If upon these facts the court should be of opinion that the plaintiff was entitled to recover, judgment was to be rendered for him, upon a default of the defendants, and his damages assessed by a jury; otherwise he was to become nonsuit and the defendants recover their costs.

PARKER, C. J. [after stating the opinion of the court that there was no lawful authority to raise the sum in question]. Thus then the general question is disposed of; but it is further relied upon in the defense that the defendants, being in the assessment of taxes authorized by vote servants or ministerial officers, ought not to be subject to an action for the mere execution of an official duty.

It is true that generally executive officers are not liable to actions for the regular execution of precepts apparently lawful, and which come from an authority which has jurisdiction over the subject. But we cannot view assessors in this light. They are not compellable to assess an illegal tax. They may exercise their judgment on the subjects for which the money appears to be voted; and they may refuse to cause the collection to be enforced, if they deem the tax illegal. If they are not liable to an action for causing an arrest, or the seizure of property, for the nonpayment of an illegal tax, it is difficult to find any remedy for an injured citizen in cases of this nature. The constable or collector is not answerable, because he acts in obedience to a warrant under the hands and seals of the assessors, who have jurisdiction over the subject, and authority to assess a tax, and to issue their warrant; and it would be dangerous to vest such officers with a right to question the legality of the proceedings which precede the assessment.

If an action would lie against the town, it could only be for the money actually received into the treasury, which, in most cases of distress, would be but a partial remedy. The assessors must then be answerable, or there will be a defect of justice. In the cases first cited, the action was against the assessors, and no objection was made on that ground; and it may be also remarked that actions have been uniformly sustained against assessors, when a sum has been assessed which was not within the authority of the town to raise.

It is further objected that, as part of the money composing this



tax was raised for legal purposes, the assessment must be considered so far legal as to support the warrant issued by the defendants; otherwise they may be held to pay in damages for money which lawfully belonged to the town. But when a part of a tax is illegal, all the proceedings to collect it must be void, as it is impossible to separate and distinguish, so that the act should be in part a trespass and in part innocent.<sup>21</sup> This point may also be considered as settled in the two cases cited; for in both those cases the greater part of the sum assessed was for lawful purposes. Whether the damages may not be diminished by the jury, in proportion to the sum which shall appear to be a lawful subject of taxation, may be considered in the inquiry which is yet to be had by the jury. \* \* \*<sup>22</sup>

Defendants defaulted.

### GUPTAIL et al. v. TEFT.

Supreme Court of Illinois, 1855. 16 Ill. 365.

Declaration in trespass quare clausum fregit, for breaking and entering a certain close in the town of Hanover, in said county of Cook, situate on section 31, and breaking down, prostrating and destroying 300 rods of fencing, and breaking the boards, rails and posts, and destroying the lumber whereof the same was made, and trampling down the herbage, etc. Damages, \$1,000.

Pleas: (1) General issue. (2) The following special pleas:

"And the said defendant, John Guptail, for further plea in this behalf, by leave, etc., says plaintiff actio non, because he says, that the said close in said declaration mentioned, is situate at and within road district number ten (10), in the town of Hanover, in the said county of Cook; that the said town was, at the time when, etc., organized under the act of the General Assembly of the state of Illinois, approved February 17, A. D. 1851, entitled 'An act to provide for township organization'; that on the 10th day of June, A. D. 1854, Andrew Spitsler, S. N. Campbell, and Christophe Sohle, were commissioners of highways in said town of Hanover, duly elected and qualified, and then and there, by virtue of their said office, and according to the force of the statute aforesaid, had the care and superintendence of the highways and bridges in said town, with power to lay out new highways, and to regulate and alter pre-existing highways in said town, and cause the same to be repaired, kept open and free from obstructions; that on the said 10th day of June, the

<sup>21</sup> On this point, see *Colton v. Hanchett*, 13 Ill. 615 (1852).

<sup>22</sup> See Rev. Laws Mass. c. 12, § 98 (St. 1823, c. 138, § 5): "Assessors shall not be responsible for the assessment of a tax assessed by them in pursuance of a vote for that purpose, certified to them by the clerk or other proper officer of a city, town, or fire district, except for the want of integrity and fidelity on their own part."

See *Lincoln v. Worcester*, 8 Cush. (Mass.) 55 (1851), post, p. 403.

said defendant was overseer of highways in said road district number ten (10), in the said town of Hanover, duly chosen and qualified as such; that it then and there became, and was, the duty of this defendant, as overseer of highways, to open new highways, and remove all obstructions to pre-existing highways, within his said district, when thereunto required by the said commissioners of highways; that on the said 10th day of June, the said commissioners of highways made and delivered to this defendant an order, in the words and figures following, to wit:

“Hanover, June 10, 1854.

“To John Guptail, Overseer of Road District No. 10, Town of Hanover:

“Sir: Complaint having been made to the commissioners of highways in and for the town of Hanover, Cook county, that the highway running on the line between the sections thirty (30) and thirty-one (31) is obstructed by a fence owned by Jonathan Teft, Sr., and he having been legally notified to remove the same, and not having complied, you are hereby ordered by the undersigned, commissioners of highways for the town of Hanover aforesaid, to remove, or cause the same to be removed, said fence within twenty days after the receipt of this order.

Andrew Spitsier,

“Christophe Sohle,

“S. N. Campbell,

“Commissioners of Highways.”

“And the said defendant avers that the said highway described in said order was the same identical close in the said declaration mentioned, the said close being then and there part and parcel of an inclosed field; and the said defendant further avers that in obedience to said order he did, at the time when, etc., break and enter upon the close in the said order and in the said plaintiff's declaration mentioned, and pull down the said fence of the said plaintiff, and remove the same from off the said close or highway, as he lawfully might do, for the cause aforesaid; and in so doing he, the said defendant, with feet in walking did a little injure the herbage and grass, corn and grain then standing and growing upon the said close, and did a little break the boards, rails and posts of which said fence was erected, doing then and there no unnecessary damage to the said plaintiff, which are the same supposed trespasses in the said declaration mentioned, and this defendant is ready to verify, etc. Wherefore, he prays judgment,” etc.<sup>23</sup>

Plaintiff demurred to each of the said special pleas, in which defendants respectively joined.

Interlocutory judgment upon demurrer for plaintiff, general issue withdrawn, jury impaneled assessed the plaintiff's damages, \$160. Final judgment.

<sup>23</sup> A special plea by the other plaintiffs in error, inhabitants required to render road labor, is omitted.

Error assigned: In sustaining plaintiff's demurrer to the said defendants' pleas.

Cause tried before J. M. Wilson, Judge, and a jury, at February term, 1855.

CATON, J. We are of the opinion that the demurrer to the two special pleas was properly sustained by the court below. They justify the trespass complained of under an order issued by the commissioners of the town of Hanover, directing the defendant Guptail, who was overseer of highways, to open a public highway on the line between sections 30 and 31, in that town, but they nowhere show that there was a legally laid out highway there. Unless there was such highway there, the commissioners of highways had no authority to order a road to be opened. They had no jurisdiction to act in the premises, and their order to the defendant was a simple nullity, conferring upon him no authority whatever. Only in such a case does the statute authorize them to issue such an order. Upon the argument an attempt was made to liken this order to a writ issued by a court of justice, which, if regular upon its face and emanating from a court having authority to issue such writs, is a justification to a ministerial officer who executes it, although in fact it is issued in a case not warranting it. In such a case the ministerial officer is not bound to go behind the writ and inquire into the regularity of the previous proceedings. Were the cases analogous, the argument would be conclusive; but they are not.<sup>24</sup> The commissioners of highways do not constitute a court in any sense, although some portion of their duties may be of a judicial character. Yet this is so in a very limited sense, and the duty in question was not of that character. Not only the commissioners themselves, but others who would seek a justification under their orders, must take the responsibility of showing that a case existed which justified them in issuing their order.

This the pleas do not show, and the judgment must be affirmed.

Judgment affirmed.<sup>25</sup>

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### CHEGARAY v. JENKINS.

Court of Appeals of New York, 1851. 5 N. Y. 376.

This action was commenced in the Superior Court of the City of New York to recover damages for the taking of personal property of the plaintiff (Madame Chegaray) by the defendant. The defendant, who was a constable of the city and county of New York, justified the taking by virtue of a warrant issued to him by the receiver of taxes for the city and county of New York for the collection of a tax alleged to have been duly assessed and imposed by the super-

<sup>24</sup> See, however, *Leachman v. Dougherty*, 81 Ill. 324 (1876).

<sup>25</sup> See, accord, *Mill v. Hawker*, L. R. 10 Ex. 92 (1875).



visors of that city and county against the plaintiff, and upon certain premises in the city of New York, owned and occupied by the plaintiff, and which were liable to taxation. The circumstances under which the assessment was made and the warrant issued, are stated in the opinion of Chief Judge Ruggles. The plaintiff obtained a verdict and judgment at the Special Term, which on bill of exceptions was reversed at the General Term, and judgment rendered in favor of the defendant. The plaintiff appealed to this court. See 3 Sandf. 409.

RUGGLES, C. J. \* \* \* But there is an insuperable objection to the plaintiff's recovery in this action against the collecting officer. By the act of 1843 (chapter 230) the office of collector of taxes is abolished, and that of a receiver of taxes is created. By article 2 of that act the supervisors are required to cause the assessment rolls of each ward to be delivered to the receiver, with warrants annexed for the collection of the taxes from each person assessed on or before the 25th of September in each year. If the tax remains unpaid to him on the 15th of April following, the receiver is authorized to issue his warrant directed to the sheriff or to any constable or marshal of the city and county, commanding him to levy the tax with interest by distress and sale of the goods of the person against whom the warrant is issued, and to pay the same over to the receiver.

The plaintiff's property was assessed by the officers authorized to make assessments in the ward where the property was situated, the assessment was confirmed by the supervisors, the roll and warrant were delivered to the receiver, the tax remained unpaid until after the day mentioned in the statute, and the receiver issued his warrant to the defendant, a constable, for its collection by distress and sale. It is admitted that the warrant was in due form of law. There is no pretense that anything appeared on its face showing a want of authority in the assessors in making the assessment, in the supervisors in confirming it, or in the receiver in issuing his warrant. The warrant, therefore, was a perfect justification to the officer in taking the plaintiff's property. The case of *Savacool v. Boughton*, 5 Wend. 170, 21 Am. Dec. 181, is conclusive on this point. It was there settled that a ministerial officer is protected in the execution of process, whether the same issue from a court of general or limited jurisdiction, although such court have not in fact jurisdiction of the case, provided it appears on the face of the process that the court has jurisdiction of the subject-matter, and the process in other respects shows no want of authority.

The principle established in the case here cited is applicable to the case before the court. The assessors, in determining whether the plaintiff's property was taxable as a dwelling, or exempt as a seminary of learning, acted judicially and within the sphere of their duty. But being officers clothed with limited powers conferred by statute, their decision on a question in which their own authority to act was in-

volved, was not for all purposes conclusive. The general principle is that the proceedings of magistrates and officers having special and limited jurisdiction must bear on their face the evidence of their jurisdiction, or they will be judged invalid, and that in collateral actions their judgments may be questioned and disregarded, if it appear that in fact they had no authority to act in the given case. Perhaps in the present case, if the defendant had sold the plaintiff's property for the tax in question, the legality of the tax might have been an open question between the plaintiff and the purchaser in an action to recover the property. But the assessors, having the general authority to make assessments for taxation within the ward in which the plaintiff's property was situated, had jurisdiction of the subject-matter of the assessment in question, and the delivery of the assessment roll and warrant to the receiver conferred on him the authority of issuing his warrant to the defendant as one of the constables of the city and county. It was no part of the duty of the defendant, a subordinate officer, to overrule or to dispute the authority of his superiors, unless upon grounds apparent on the face of their mandate. The law does not give him the means of ascertaining extrinsic facts for this purpose, nor does it attribute to him the capacity for reviewing the assessment on such facts, if they could be ascertained.

The cases of *Suydam v. Keyes*, 13 Johns. 444, *Smith v. Shaw*, 12 Johns. 257, and *Wise v. Withers*, 3 Cranch, 331, 2 L. Ed. 457, so far as they countenance the contrary doctrine, are overruled in *Savacool v. Boughton*, above referred to. The constable must be protected by the law, in the discharge of a duty imposed by law. The plaintiff in this case was not without remedy. Application might have been made in the first instance to the assessors for a review of their assessment (1 Rev. St. p. 393, § 22), and if that failed the supervisors of the city and county of New York were authorized by Act May 2, 1844, c. 250, § 2, to correct any erroneous assessment within six months after the return of the assessment rolls.

Whether the error in this assessment might have been corrected on a certiorari to the assessors, or to the supervisors after having made the proper application to them, without success, for relief, is not material to the present question. The constable cannot be made responsible on the ground that no relief elsewhere can be had.

Judgment affirmed.<sup>26</sup>

<sup>26</sup> Accord: *Erskine v. Hohnbach*, 14 Wall. 613, 20 L. Ed. 745 (1872); *Harding v. Woodcock*, 137 U. S. 43, 11 S. Ct. 6, 34 L. Ed. 580 (1890); *Stutsman County v. Wallace*, 142 U. S. 293, 12 Sup. Ct. 227, 35 L. Ed. 1018 (1892); *Throop, Public Officers*, §§ 756-770.

See, however, *Nichols v. Walker & Carter*, 4 Cro. Car. 394 (1634).

## SECTION 31.—ACTION AGAINST SUPERIOR OFFICER

## KEENAN v. SOUTHWORTH.

Supreme Judicial Court of Massachusetts, 1872. 110 Mass. 474, 14 Am. Rep. 613.

Tort against the postmaster of East Randolph, to recover damages for the loss, by the defendant's negligence, of a letter addressed to the plaintiff. At the trial in the superior court, before Pitman, J., the plaintiff introduced evidence, not now necessary to report, that the letter was received at the post office at East Randolph, and was lost by the negligence or wrongful conduct of one Bird, who was the postmaster's clerk. The plaintiff having disclaimed "any actual participancy or knowledge of the acts of Bird on the part of the defendant," the judge ruled that the defendant was not liable for any careless, negligent or wrongful acts of Bird; and, by consent of the plaintiff, he directed a verdict for the defendant, and reported the case for the consideration of this court. If the ruling was wrong, the verdict to be set aside, and the case to stand for trial; otherwise, judgment for the defendant on the verdict.

GRAY, J. The law is well settled, in England and America, that the Postmaster General, the deputy postmasters, and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him, and subject to his orders. *Lane v. Cotton*, 1 Ld. Raym. 646, 12 Mod. 472; *Whitfield v. Le Despencer*, Cowp. 754; *Dunlop v. Munroe*, 7 Cranch, 242, 3 L. Ed. 329; *Schroyer v. Lynch*, 8 Watts (Pa.) 453; *Bishop v. Williamson*, 11 Me. 495; *Hutchins v. Brackett*, 22 N. H. 252, 53 Am. Dec. 248.

The ruling at the trial was therefore right; and the plaintiff, having consented to a verdict for the defendant, reserving only the question of the correctness of that ruling, cannot now raise the question whether there was sufficient evidence of the defendant's own negligence to be submitted to the jury.

Judgment on the verdict.<sup>27</sup>

<sup>27</sup> See *Robertson v. Sichel*, 127 U. S. 507, 8 Sup. Ct. 1286, 32 L. Ed. 203 (1888), accord; also *Whitfield v. Lord de Spencer*, 2 Cowp. 754 (1778).

The liability of certain officers connected with the administration of justice who were paid by fees (especially sheriffs) for their deputies is established by common law and frequently recognized by statute. See *Rev. Laws Mass. c. 23, § 1*; *Rev. St. Ill. c. 125, § 13*.

*St. Westm. II, 13 Edw. I, c. 11*: "And if the keeper of the gaol have not wherewith he may be justified, or not able to pay, his superior, that commit-



ted the custody of the gaol unto him, shall be answerable (respondeat superior suus) by the same writ."

Also, 2 Henry VI, c. 10, § 1423: "All the officers made by the King's letters patents royal within the said courts [of our lord the King] which have power and authority by virtue of their offices of old times accustomed to appoint clerks and ministers within the same courts shall be charged and sworn to appoint such clerks and ministers, for whom they will answer at their peril, which be sufficient, faithful, and attending to that which pertaineth to them in performance of the business, as well of the King, as of his people."

See *Hazard v. Israel*, 1 Bin. (Pa.) 240, 2 Am. Dec. 438 (1808); *Campbell v. Phelps*, 1 Pick. (Mass.) 62, 66, 11 Am. Dec. 139 (1822); *Wood v. Farnell*, 50 Ala. 546 (1874); *McNutt v. Livingston*, 7 Smedes & M. (Miss.) 641 (1846).

The following additional cases in this collection are suits against officers: *Grindley v. Barker*, 1 Bos. & P. 229 (1798); *McCoy v. Curtice*, 9 Wend. (N. Y.) 17, 24 Am. Dec. 113 (1832); *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397 (1836); *Johnson v. Stedman*, 3 Ohio, 94 (1827); *Eldred v. Sexton*, 5 Ohio, 216 (1831); *Patterson v. Miller*, 2 Metc. (Ky.) 493 (1859); *Neff v. Paddock*, 26 Wis. 546 (1870); *Hubbell v. Goodrich*, 37 Wis. 84 (1875); *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89 (1881); *Baldwin v. Smith*, 82 Ill. 162 (1876); *Warne v. Varley*, 6 T. R. 443 (1795); *Thompson v. Farrer*, 9 Q. B. D. 372 (1882); *De Lima v. Bidwell*, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041 (1901); *Amy v. Supervisors*, 11 Wall. 136, 20 L. Ed. 101 (1870).

## CHAPTER 7

### ACTION AGAINST THE COMMUNITY

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#### SECTION 32.—ACTIONS AGAINST MUNICIPAL CORPORATIONS—IN TORT<sup>1</sup>

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#### LEVY v. MAYOR, ALDERMEN AND COMMONALTY OF CITY OF NEW YORK.

Superior Court of City of New York, 1848. 1 Sandf. 465.

Trespass on the case.

The city of New York, having the requisite power, enacted an ordinance prohibiting swine from running at large in the streets, with a suitable penalty, and a provision for impounding the delinquent animals. The plaintiff's infant son was attacked by a swine straying in the street and was mortally injured.

Demurrer to declaration. \* \* \*

SANDFORD, J. The plaintiff's counsel well observed that there was no precedent for such an action as this, and we are compelled to add that there is no principle upon which it can be sustained.

The corporation is undoubtedly vested with certain legislative powers, among which is the authority to restrain swine from running at large in the streets; and they have exercised it by enacting an ordinance to that effect. The idea, that because they may prohibit a nuisance, that therefore they must not only pass a prohibitory law, but must also enforce it, at the hazard of being subjected to all damages which may ensue from such nuisance, is certainly novel. The corporation of the city in this respect stands upon the same footing within its own jurisdiction as the state government does in respect of the state at large.

It is the duty of the government to protect and preserve the rights of the citizens of the state, both in person and property, and it should provide and enforce wholesome laws for that object. But injuries to both person and property will occur, which no legislation can prevent, and which no system of laws can adequately redress. The government does not guaranty its citizens against all the casualties incident to humanity or to civil society; and we believe it has never

<sup>1</sup> The question of liability for neglect of ministerial duties is not considered. See full review of authorities in *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332 (1877); also E. M. Borchard, *Government Liability in Tort*, 34 Yale Law Journal, 129, 229.

been called upon to make good, by way of damages, its inability to protect against such misfortunes.

There would be no end to the claims against this city and state, if such an action as this is well founded. If a man were to be run over, and his leg broken, by an omnibus racing in the street, he would forthwith sue the city for damages, because the corporate authorities neglected to enforce their ordinance against racing and furious driving in the public streets. So, if some miscreant, by placing a stick of timber on a railroad track, should cause the destruction of a passenger train, with great loss of life and limb, the Legislature would be petitioned by the injured survivors, and the relatives of the deceased, for the damages thereby occasioned, on the ground that the public servants should have enforced the statute enacted against such offenses.

There are innumerable illustrations of the application of the principle. It suffices to say that no government, whether national, state or municipal, ever assumed, or was subjected to, a general liability of this description.

There is no analogy between a municipal corporation in respect of its legislative functions, and the duty or the liability of turnpike companies, or other private corporations aggregate. And the same may be said of the duty of commissioners of highways, and like public officers, clothed with adequate power for the performance of some plain executive or ministerial duty.

As to the argument that the common law imposes upon the corporation the duty and liability in question, we are unable to appreciate it. Nor do we understand that, as a corporation, it is subjected per se to the duty of keeping swine out of the streets.

We have had occasion frequently to hold the city liable for the negligence and misfeasance of its officers and agents; but the principle of that liability has no application here.

Waiving the consideration of the other objections to the action, which are presented by the demurrers, we must decide that the suit cannot be maintained.

Judgment for the defendants.<sup>2</sup>

<sup>2</sup> See, accord, *Hines v. Charlotte*, 72 Mich. 278, 40 N. W. 333, 1 L. R. A. 844 (1888); *Jones v. Williamsburg*, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294 (1900).

Contra: *Cochrane v. Frostburg*, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728, 48 Am. St. Rep. 479 (1895).

As to statutory liability for damage done by mobs, see *Darlington v. Mayor, etc.*, 31 N. Y. 164, 88 Am. Dec. 248 (1865); *Chicago v. Manhattan Cement Co.*, 178 Ill. 372, 53 N. E. 68, 45 L. R. A. 848, 69 Am. St. Rep. 321 (1899).



## ASHLEY v. CITY OF PORT HURON.

Supreme Court of Michigan, 1877. 35 Mich. 296, 24 Am. Rep. 552.

COOLEY, C. J. The action in this case was instituted to recover damages for an injury caused to the house of plaintiff by the cutting of a sewer under the direction of the city authorities, and under city legislation the validity of which is not disputed. The necessary result of cutting the sewer, the plaintiff claims, was to collect and throw large quantities of water upon his premises which otherwise would not have flowed upon them; and it is for an injury thereby caused that he sues. The evidence offered on the part of the plaintiff tended to establish the case he declared upon; but the court instructed the jury that, though they should find the facts to be as the plaintiff claimed, they must still return a verdict for the defendant. The ground of this decision, as we understand it, was that the city, in ordering the construction of the sewer and in constructing it, was acting in the exercise of its legislative and discretionary authority, and was consequently exempt from any liability to persons who might happen to be injured. That is the ground that is assumed by counsel for the city in this court, and it is supposed to be the ground on which the case was decided in the court below.

In *Pontiac v. Carter*, 32 Mich. 164, the question of the liability of a municipal corporation for an injury resulting from an exercise of its legislative powers was considered, and it was denied that any liability could arise so long as the corporation confined itself within the limits of its jurisdiction. That was a case of an incidental injury to property caused by the grading of a street. The plaintiff's premises were in no way invaded, but they were rendered less valuable by the grading, and there was this peculiar hardship in the case, that the injury was mainly or wholly owing to the fact that the plaintiff's dwelling had been erected with reference to a grade previously established and now changed. In the subsequent case of *City of Detroit v. Beckman*, 34 Mich. 125, 22 Am. Rep. 507, the same doctrine was reaffirmed. That was a case of injury by being overturned in a street in consequence of what was claimed to be an insufficient covering of a sewer at a point where two streets crossed each other. It was counted upon as a case of negligence, but the negligence consisted only in this: That the city had failed to provide for covering the sewer at the crossing of a street for such a width as a proper regard for the safety of people passing along the street would require. If this case is found to be within the principle of the cases referred to, the ruling below must be sustained, and that, we think, is the only question we have occasion to discuss.

The cases that bear upon the precise point now involved are numerous. In *Proprietors of Locks, etc., v. Lowell*, 7 Gray (Mass.) 223, it was held that a city was liable in an action of tort for draining water through sewers and drains into a canal owned by a private cor-

poration, thereby causing injury to the canal; the conclusion being planted on the right of the corporation "to an unmolested enjoyment of the property." \* \* \*

In *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, 53 Am. Dec. 316, the city was made to respond in damages for flooding private premises with waters gathered in a sewer. This case is commented on in *Mills v. Brooklyn*, 32 N. Y. 489, and distinguished from one in which the injury complained of arose from the insufficiency of a sewer which was constructed in accordance with the plan determined upon. Obviously the complaint in that case was of the legislation itself, and of incidental injuries which it did not sufficiently provide against. The like injuries might result from a failure to construct any sewer whatever; but clearly no action could be sustained for a mere neglect to exercise a discretionary authority. Compare *Smith v. Mayor, etc.*, 6 *Thomp. & C. (N. Y.)* 685, 4 *Hun*, 637; *Nims v. Mayor, etc.*, 59 N. Y. 500.

Cases of flooding lands by neglect to keep sewers in repair, of which *Barton v. Syracuse*, 37 *Barb.* 292, and 36 N. Y. 54, is an instance, are passed by, inasmuch as it is not disputed by counsel for the defendant in this case that for negligent injuries of that description the corporation would be responsible. Those cases are supposed by counsel to be distinguished from the one before us in this: That here the neglect complained of was only of a failure to exercise a legislative function, and thereby provide the means for carrying off the water which the sewer threw upon the plaintiff's premises. The distinction is that the obligation to establish and open sewers is a legislative duty, while the obligation to keep them in repair is ministerial. But it is not strictly the failure to construct sewers to carry off the water that is complained of in this case. It is of the positive act of casting water upon the plaintiff's premises by the sewer already constructed.

An action like the one at bar was sustained in *Nevins v. Peoria*, 41 *Ill.* 502, 89 *Am. Dec.* 392, *Aurora v. Gillett*, 56 *Ill.* 132, *Aurora v. Reed*, 57 *Ill.* 30, 11 *Am. Rep.* 1, *Alton v. Hope*, 68 *Ill.* 167, and *Jacksonville v. Lambert*, 62 *Ill.* 519. The same is true of *Pettigrew v. Evansville*, 25 *Wis.* 223, 3 *Am. Rep.* 50, where *Dixon, C. J.*, is at some pains to distinguish the case from one of merely incidental injuries. The case of *Vincennes v. Richards*, 23 *Ind.* 381, appears by the report to have turned on this distinction. And see *Cotes v. Davenport*, 9 *Iowa*, 227. \* \* \*

It is very manifest, from this reference to authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. \* \* \*

A municipal charter never gives and never could give authority to

appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other. *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557; *Arimond v. Green Bay, etc., Co.*, 31 Wis. 316; *Eaton v. B. C. & M. R. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147.

A like excess of jurisdiction appears when in the exercise of its powers a municipal corporation creates a nuisance to the injury of an individual. The doctrine of liability in such cases is familiar, and was acted upon in *Pennoyer v. Saginaw*, 8 Mich. 534. \* \* \*

### COHEN v. MAYOR, ETC., OF NEW YORK.

Court of Appeals of New York, 1889. 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506.

Appeal from Supreme Court, General Term, First Department.

This action was brought by Hannah and Abraham Cohen, as administrators, to recover damages for the death of plaintiffs' decedent, which occurred by reason of a wound in the head caused by the falling of a pair of thills attached to a grocer's wagon upon him while the decedent was walking through one of the streets of the city of New York. Evidence was given on the trial tending to prove the following facts:

On the morning of October 20, 1879, one Pischel Cohen was walking through Attorney street in such city, and at the same time an ice wagon was passing south through that street, and a wagon loaded

<sup>3</sup> Accord: *Miles v. Worcester*, 154 Mass. 511, 28 N. E. 676, 13 L. R. A. 841, 26 Am. St. Rep. 264 (1891); *Huffmire v. Brooklyn*, 162 N. Y. 584, 57 N. E. 176, 48 L. R. A. 421 (1900), destruction of oysters by sewage; *Platt Bros. v. Waterbury*, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335 (1900) with notes. Contra: *Duncan v. Lynchburg* (Va., not officially reported) 34 S. E. 964, 48 L. R. A. 331 (1900); *Board of Education of Cincinnati v. Volk*, 72 Ohio St. 469, 74 N. E. 646 (1905).

See *Johnston v. District of Columbia*, 118 U. S. 19, 6 Sup. Ct. 923, 30 L. Ed. 75 (1886): "The duties of the municipal authorities, in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion, in the selection and adoption of the general plan or system of drainage, is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land. But the construction and repair of sewers according to the general plan so adopted are simply ministerial duties, and for any negligence in so constructing a sewer, or keeping it in repair, the municipality which has constructed and owns the sewer may be sued by a person whose property is thereby injured."

As to distinction between legislative and ministerial acts, compare *Mills v. Brooklyn*, 32 N. Y. 489 (1865), with *Barton v. Syracuse*, 36 N. Y. 54 (1867).



with coals was coming north through the same street. A grocery wagon, without any horse attached, was standing in front of the grocery store kept by one Marks, who owned the wagon. The thills were tied up in a perpendicular manner with some kind of string; and the length of the wagon was parallel with the length of the street. For some reason the driver of the ice wagon started up his horses, seemingly for the purpose of passing the grocery wagon before the driver of the coal wagon should reach it. The street was narrow, and the ice man's wagon caught in some way against the wheel of the grocery wagon, and turned the wagon somewhat around, so that the thills came down on the sidewalk. At that time Cohen was passing, and the iron on one of the thills struck him on the head and knocked him down, inflicting an injury upon him, from the effect of which he died the same day. The string with which the thills were fastened was a thin, common string; and they had been tied up that way for several months, but whether with the identical string used on the occasion when the accident occurred the witness could not say. The wagon was used by its owner, the grocer, as the evidence tended to show, for the purpose of facilitating the transaction of his private business; and it was in no sense a public cart. When not in actual use, the wagon was kept in the street in front of the owner's grocery store, day and night, under a permit which was granted by defendant in consideration of the payment by the owner of two dollars therefor. No law or ordinance existed which gave jurisdiction to the defendant through its common council, or through any of its officers, to license or permit such a use of the highway.

Upon this evidence as to the manner in which the accident occurred the court directed the jury to find a verdict for the defendant, and the plaintiff duly excepted to such direction. The direction was given by the court below on the ground that the cause of the injury was the defective manner in which the thills were tied, and there was no evidence of any notice to the city as to that fact. The General Term affirmed the judgment of the circuit court, and plaintiffs appeal.

PECKHAM, J. (after stating the facts as above). The storing of the wagon on the highway was a nuisance. The primary use of a highway is for the purpose of permitting the passing and repassing of the public; and it is entitled to the unobstructed and uninterrupted use of the entire width of the highway for that purpose, under temporary exceptions as to deposits for building purposes, and to load and unload wagons, and receive and take away property for or in the interest of the owners of the adjoining premises, which it is not now necessary to more specifically enumerate. The extent of the right of such exceptional user was before us in the late case of *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831, and nothing more need be said regarding it here.

It is no answer to the charge of nuisance that, even with the obstruction in the highway, there is still room for two or more wagons to pass, nor that the obstruction itself is not a fixture. If it be perma-

nently or even habitually in the highway, it is a nuisance. The highway may be a convenient place for the owner of carriages to keep them in, but the law, looking to the convenience of the greater number, prohibits any such use of the public streets. The old cases said the king's highway is not to be used as a stable yard; and a party cannot eke out the inconvenience of his own premises by taking in the public highway. These general statements are familiar, and are borne out by the cases cited. *King v. Russell*, 6 East, 427, decided in May, 1805; *Rex v. Cross*, 3 Camp. 224; *Rex v. Jones*, Id. 230; *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 709; *Davis v. Mayor, etc.*, 14 N. Y. 506, 524, 67 Am. Dec. 186; *Callanan v. Gilman*, *supra*.

Familiar as the law is on this subject, it is too frequently disregarded or lost sight of. Permits are granted by common councils of cities, or by other bodies in which the power to grant them for some purposes is reposed; and they are granted for purposes in regard to which the body or board assuming to represent the city has no power whatever, and the permit confers no right upon the party who obtains it. As was said by Lord Ellenborough in the case of *Rex v. Jones*, *supra*, the law upon the subject is much neglected, and great advantages would arise from a strict, steady application of it. This case is a good example of its neglect. There is no well-founded claim of the existence of a power in the defendant to issue such a license. The defendant refers to sections 10 and 27 of chapter 37 of the ordinances of 1859. The former provides for an assignment by the mayor of a stand where the owner of a duly-licensed public cart may let it remain waiting to be employed, and also a stand where it may remain at other times upon certain terms, etc. The latter section refers to a licensed cartman, and provides for storing his cart in front of his premises under certain regulations. Neither section has anything to do with a case like this. The Legislature has expressly enacted that the city shall have no power to authorize the placing or continuing of any encroachments or obstructions upon any street or sidewalk, except the temporary occupation thereof during the erection or repair of a building on a lot opposite the highway. Consolidation Act, p. 23, § 86, subd. 4; *People v. Mayor, etc.*, 59 How. Prac. 277; *Ely v. Campbell*, 59 How. Prac. 333; *Lavery v. Hannigan*, 20 Jones & S. 463.

The owner of this wagon was not a cartman, nor was the wagon used as a public cart, but only as a means to enable the grocer to transact his own private business. He acquired no right by virtue of the license to store his wagon in the street; and, in doing so, he was clearly guilty of maintaining a public nuisance. The defendant was also guilty. It assumed to authorize the erection and continuance of a public nuisance. To be sure, the legal power to grant the license to obstruct the street was by the Legislature withheld from the defendant, yet, nevertheless, it did grant just such a permit and took compensation on account of it. In thus doing, the city became

a partner in the erection and continuance of such nuisance. It was a nuisance, not by reason of the manner in which the thills were tied up, but because the wagon was stored in the street. It was not a mere negative attitude which the defendant adopted, such as would have been the case had it simply acquiesced in the manner in which the street was used. In this case it not only acquiesced in such use, but it actually encouraged it by making out and delivering a license to do it; and it received directly and immediately from the owner of the wagon a compensation for the erection and maintenance of a nuisance under the authority of such license. Under such circumstances the defendant must be held liable the same as if it had itself maintained the nuisance; for the owner of the wagon was nothing more than an agent through whom the defendant did this unlawful act. *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603.

But, assuming that the city had no right to issue the permit, it is urged that such license did not authorize the negligence which caused Cohen's death, and that the act of the defendant was too remote to be regarded as the proximate cause of the damage herein. We do not think so. The act of the defendant was wrongful, and it consisted in setting up an obstruction in the public highway, and this accident happened because of the presence of the obstruction at the point in question. It was there by the act of the defendant, and, being there, it has caused the injury. To be sure, it may be said that, if the thills had not been negligently tied, they would not have fallen. But that was simply the way in which, by reason of the presence of the obstruction, the accident occurred. There is always reasonable ground for apprehending accidents from obstructions in a public highway, and any person who wrongfully places them there, or aids in so doing, must be held responsible for such accidents as occur by reason of their presence. The obstruction in such case must be regarded, within the meaning of the law on the subject, as the proximate cause of the damage.

We think that in a case like this, where no obstruction would have existed but for the wrongful conduct of defendant, it must be held responsible for the damage which is caused by reason of the obstruction, even though it might not have happened if the licensee had been careful in regard to the manner in which he exercised the assumed right granted him by the license. The defendant, under these circumstances, must take the risk of such care, and not an innocent passer-by. This is not a case for the application of the doctrine that where the injury results from the negligent mode in which the licensee exercises the privilege granted to him, which mode is not part of the license, there must be proof of negligence showing permission to use, or acquiescence in the use of, the mode after notice or knowledge on the part of the licensor. That may be the rule where the thing licensed is legal because of the license, and the illegality consists in the manner in which the license is carried out. The difficulty here does not alone consist in the negligent manner



of fastening up the thills, but the license itself—the permission, with or without a consideration, to obstruct the street at all for any such purpose as was the case here—is the wrongful act on the part of the defendant which renders it responsible for the damage naturally sustained from such obstruction.

We do not say that this principle of responsibility would render the city liable in every case of a mistaken exercise of power authorizing the use or occupancy of a public street by an individual. We confine ourselves to the decision of this case, and we simply say that when the city, without the pretense of authority, and in direct violation of a statute, assumes to grant to a private individual the right to obstruct the public highway while in the transaction of his private business, and for such privilege takes compensation, it must be regarded as itself maintaining a nuisance so long as the obstruction is continued by reason of and under such license, and it must be liable for all damages which may naturally result to a third party who is injured in his person or his property by reason or in consequence of the placing of such obstruction in the highway. This is none too severe a liability. It is to be hoped that its enforcement will tend to the discontinuance of a custom of granting permits or licenses to do what it is well known the city has no right to authorize or license. Such licenses, it is matter of public notoriety, are constantly granted without any semblance of legal authority; and the licensees are continually acting under them, and obstructing the public streets, to the serious inconvenience and danger of the public. When it is understood that such license has not only no effect in the way of legalizing an obstruction, but that it simply makes the city a partner in the maintenance of a public nuisance, and liable for the damage caused thereby, such knowledge may perhaps restrain the utterly illegal practice, and tend in some degree to the protection of the public in the lawful use of its own highways.

The judgment must be reversed, and a new trial granted, with costs to abide the event. All concur, except GRAY, J., dissenting on the ground that, assuming the city could not legally grant a license to Marks to keep his wagon in the street, that fact, in this case, was not sufficient to charge the city with liability for the occurrence complained of. The proximate or immediate cause of the injury to the plaintiff's intestate was the negligent acts of others.<sup>4</sup>

<sup>4</sup> See *Landau v. New York*, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709 (1904); *Van Cleef v. Chicago*, 240 Ill. 318, 88 N. E. 815, 23 L. R. A. (N. S.) 636, 130 Am. St. Rep. 275 (1909); *Little v. Madison*, 42 Wis. 643, 24 Am. Rep. 435 (1877).

## CRAIG v. CITY OF CHARLESTON.

Supreme Court of Illinois, 1899. 180 Ill. 154, 54 N. E. 184.

Appeal from Appellate Court, Third District.

Action by Edward C. Craig against the City of Charleston. A judgment for defendant on demurrer was affirmed by the Appellate Court (78 Ill. App. 312), and plaintiff appeals. Affirmed.

PER CURIAM. In affirming the judgment of the circuit court for costs and sustaining the demurrer to the plaintiff's declaration, the following opinion, delivered by Mr. Justice HARKER, was rendered by the Appellate Court:

"The sufficiency of the declaration is the only question for our consideration. Stripped of their surplusage, the material averments of fact are that the city of Charleston, on an occasion when a large crowd of people had congregated in the city, appointed one John Apgar as an officer to prevent the obstruction of the streets by vehicles or otherwise, and placed him in control of one of the streets; that Apgar was a dangerous and violent man, and possessed an ungovernable temper and vicious disposition, which facts were known, or by the exercise of reasonable diligence could have been known, to the appointing officer; that Apgar, while in charge of the street and under pretense of discharging his duty, made a brutal and unjustifiable assault upon the plaintiff with a stick, whereby the plaintiff lost one of his eyes, and was otherwise injured. The duties devolving upon Apgar by virtue of his appointment were police duties. He was what is sometimes aptly termed a 'special policeman,' authorized to perform certain specific acts. It is a familiar rule of law, supported by a long line of well-considered cases, that a city, in the performance of its police regulations, cannot commit a wrong through its officers in such a way as to render it liable for tort.

"It is contended, however, that appellant does not base his right of recovery against the city upon the wrongful act of Apgar, merely, but upon the wrongful act of the mayor in appointing such a man as Apgar, when he knew, or should have known, of his dangerous and vicious character. The same principle which absolves the city from liability for Apgar's tortious act applies to the act of the mayor. The mayor was simply exercising a discretion vested in him by virtue of his office and the laws of the state. If the appointment was a wrongful act, which resulted in injury to the appellant, the burdens of liability cannot be cast upon the inhabitants and taxpayers of the city. A municipal corporation, while simply exercising its police powers, is not liable for the acts of its officers in the violation of the laws of the state and in excess of the legal powers of the city. Dill. Mun. Corp. §§ 950, 968; Town of Odell v. Schroeder, 58 Ill. 353; City of Chicago v. Turner, 80 Ill. 419; Wilcox v. City of Chicago, 107 Ill. 334, 47 Am. Rep. 434; Blake v. City of Pontiac, 49 Ill. App. 543.

"Appellant further contends that the placing of Apgar in the street and in control of it was the creation of a nuisance, upon which ground it is liable—in fact, his chief contention is that he became thereby an obstruction in the street—and cites a long list of authorities in support of the proposition that it is the duty of a city to keep its streets free from obstructions, and a failure in that regard will render it liable for injuries caused thereby. We cannot regard a human being, in the exercise of police powers, as an obstruction, in the sense contemplated by the unquestioned doctrine announced by those cases. We think the court properly sustained the demurrer to the declaration."

After a careful consideration of the case, we have reached the same conclusion as that arrived at by the courts below; and, concurring in the views of the Appellate Court, we see no necessity for another opinion on this appeal, but adopt the one above set out as the opinion of this court in the case. The judgment of the Appellate Court is affirmed.

Judgment affirmed.<sup>5</sup>

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### CITY OF SAN ANTONIO v. WHITE.

Court of Civil Appeals of Texas, 1900. 57 S. W. 858.

Action by George M. White against the City of San Antonio. From a judgment for plaintiff, defendant appeals. Reversed.

JAMES, C. J. Plaintiff, George M. White, was engaged in running the Maverick Hotel, in San Antonio, about September, 1897. Texas had quarantined against New Orleans on account of yellow fever. A theatrical troupe left New Orleans on the last train before this quarantine was declared and came direct to San Antonio. Several (five or six) of the members of this troupe registered at the Maverick Hotel on the morning of September 7th for breakfast, the others taking quarters elsewhere in the city. In the early afternoon the troupe collected at the opera house for a rehearsal, and late in the afternoon they, 17 or more in all, were, under direction of the mayor and city physician, taken charge of by police, and taken in a body to the Maverick Hotel, where, without the consent and over the protest of plaintiff and his wife, they were quartered as yellow fever suspects, on the third floor of the hotel, and there detained by police officers for six days, the officers using the stairways. The effect of this action upon plaintiff's hotel business was to convert it from a profitable business to a losing one, until June following, when he went out of the business by making a deed of trust.

The answer of defendant alleged that the city, under its charter,

<sup>5</sup> Accord: *Buttrick v. Lowell*, 1 Allen (Mass.) 172, 79 Am. Dec. 721 (1861); *McIlhenney v. Wilmington*, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470 (1900); *Levin v. Burlington*, 129 N. C. 184, 39 S. E. 822, 55 L. R. A. 390 (1901).



had power to make regulations to secure the general health of the city, to make regulations to prevent the introduction of contagious diseases into the city, to make quarantine laws for that purpose, and to enforce the same, and to make all ordinances and regulations to prevent the spread of any contagious diseases within the city limits, and to establish hospitals and pest houses; also that the city council had ordained that, for the purpose of preventing the introduction of any contagious disease within the city limits, the mayor should be authorized by proclamation, and it was made his duty, whenever the board of health should deem it necessary, to establish quarantine against all persons coming to the city who were liable to cause the introduction or spread of such contagious disease, as well as the isolation and quarantine of all persons within the city, such quarantine to be carried into effect in accordance with the rules and regulations established by the board of health; and further ordained that the mayor and board of health should have power to employ guards and assistants when necessary, and to establish quarantine stations, pest houses, and hospitals for all persons detained under quarantine regulations. It was alleged by defendant that the mayor and board of health, by virtue of said ordinance, for the purpose of preventing the introduction into the city of yellow fever, did, with plaintiff's consent, temporarily isolate and quarantine the said persons at plaintiff's hotel, to the end that such suspected persons should not mingle with the people at large and endanger the public health, and that all the acts of its mayor and board of health were done and performed in good faith, and for the public good, and such acts were due in respect to governmental functions for which defendant is not liable. The mayor and health officer were dismissed from the suit, and the city remained the sole defendant.

The second assignment is that the court should have sustained defendant's special exception to the petition, upon the ground that the city was not liable for the acts of its co-defendants, the mayor and health officer, said acts not being acts of the city; there being no allegation that such acts were authorized by the city council. The allegation was that the city, by and through its mayor and health officer, committed the acts complained of. It is probable that this was sufficient allegation that the city caused the acts to be done. We deem it more advisable to pass upon the liability of the city in the light of the evidence.

The acts detailed above, which are as the jury must have found the facts to be, constituted an unwarrantable trespass, for which the mayor and health officer were probably liable. A fact that is essential to the city's liability in cases of this kind is wanting, viz. the fact that the city was, or has made itself, a party to the trespass. There is absolutely no evidence from which it can be found that the city directed, or has ratified, the proceeding. A city is not liable for acts of its health officers, or for malfeasances or misfeasances,

in the line of their public duties. *Shear. & R. Neg.* § 266; *Bates v. City of Houston*, 14 Tex. Civ. App. 287, 37 S. W. 383, where the subject is discussed with ample citation of authorities; *Gilboy v. City of Detroit*, 115 Mich. 121, 73 N. W. 128. The last case goes so far as to hold that the city would, in no event, be liable for such acts. We are of opinion that at least, without some testimony connecting the corporation with the transaction complained of, either by showing its previous direction, or participation therein, or ratification, there is no basis for any claim of liability against it. In the cases of *City of San Antonio v. Mackey*, 14 Tex. Civ. App. 210, 36 S. W. 760, and *City of Dallas v. Allen* (Tex. Civ. App.) 40 S. W. 324, decided by this court, the liability of the city existed by reason of the direction or participation of the cities themselves.

The ground of liability upon which appellant chiefly relies is that the act complained of amounted to an appropriation of property for public uses, and that the city is bound to compensate plaintiff by force of the constitutional guaranty. We are of opinion that a city could not, under the guise of exercising a strictly governmental power, evade this constitutional provision. But it is clear that the act must be the act of the city in such a case. A city cannot be held liable for property taken or appropriated by a trespass with which it has no connection at all. The act complained of here was done by the mayor and health officer, and the city is not shown to have directed it, nor adopted it as its own. *Dooley v. City of Kansas*, 82 Mo. 444, 52 Am. Rep. 380. We conclude that the fifth assignment was well taken, viz. error in refusing to charge the jury that the city was not liable for any wrong or trespass committed by its mayor, city physician, or police officers, and therefore to return a verdict for defendant.

Reversed and remanded.

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#### NEW YORK CITY CHARTER (LAWS 1901, c. 466) § 1196.

No member, officer or agents of said department of health, and no person or persons other than the department of health or the city itself shall be sued or held to liability for any act done or omitted by either person aforesaid, in good faith, and with ordinary discretion, on behalf or under said department, or pursuant to its regulations, ordinances or health laws. And any person whose property may have been unjustly or illegally destroyed or injured, pursuant to any order, regulation or ordinance, or action of said department of health or its officers, for which no personal liability may exist as aforesaid, may obtain a proper action against the city for the recovery of the proper compensation or damage. Every such suit must be brought within six months after the case of action arose, and the recovery shall be limited to the damages suffered.

## SECTION 33.—SAME—ON IMPLIED CONTRACT

## LINCOLN v. CITY OF WORCESTER.

Supreme Judicial Court of Massachusetts, 1851. 8 Cush. 55.

SHAW, C. J. This is an action for money had and received, to recover back money paid by the plaintiff to the tax collector, on the ground that the city, by their collector and treasurer, have received a sum of money which they have no just right to retain. The ground upon which this claim is made is that the assessors were chargeable with various mistakes and irregularities, amounting to violations of law, in making their assessment on his property, by misdescription, by classing together lots and parcels of land which ought to have been taxed separately, and by separating into different parcels estates which should have been combined into one parcel and taxed together; also that, in regard to certain personal property, the plaintiff has been taxed for shares for which he was not legally taxable.

The first and great question to be considered, before we can begin to inquire into these irregularities, is whether assumpsit for money had and received will lie against the city, provided such irregularities are shown, and if the assessors acted contrary to the directions of law, in the details of their proceedings in the assessment of taxes. There is another mode of proceeding provided by law (by application for abatement and by appeal), well adapted to correct all errors and mistakes, to relieve the party taxed in regard to all those particulars in which the irregular proceeding can act injuriously upon him, and to confirm and hold good that which upon revision appears regular and conformable to law. When assumpsit lies to recover back money paid, it proceeds on the ground that the tax is void, that the plaintiff has paid it upon compulsion, and that the city, into whose treasury it has passed, in equity and good conscience cannot retain it. It follows that if the whole proceeding is void, and the plaintiff can recover his money back on that ground, it being too late to assess the taxes of a past year again, the plaintiff will avoid paying those sums, which it is conceded were well assessed, and which he is bound equitably, as well as legally, to pay.

The question then may be asked, why has the action for money had and received been sustained in any case? To this question it may be proper to offer an answer, and attempt to point out the distinction upon which the cases rest.

We are inclined to think that the maintenance of an action to recover back money paid for a tax (except perhaps in case of a parish tax, in favor of a person of another denomination, under the provisions of the Constitution of Massachusetts—*Murray v. First Parish*



in Gloucester, 2 Dane, Abr. 330, and other cases there cited), is of comparatively recent origin.

The common course was, it is believed, to bring trespass against the assessors, in all cases where the plaintiff intended to hold that he was not liable at all, and that the tax was wholly void. It was not brought against the collector, because he was justified by his warrant from a tribunal of competent jurisdiction; but against the assessors. It proceeded on the ground that as in trespass all are principals, including those who command an illegal act to be done, and as the assessors had issued a warrant to a subordinate executive officer commanding him to levy a tax upon the plaintiff, in a case where they had no authority, and to take his property or person in case of nonpayment, the service of such a warrant was an illegal act, done by their command, and was in theory of law a trespass, for which an action would lie.

In the case of *Stetson v. Kempton*, 13 Mass. 272, 17 Am. Dec. 145, decided in 1816, it was held that trespass against the assessors would lie, although the sum assessed on the plaintiff was laid and assessed by a vote of the town, to raise money for the defense of the town against a public enemy, such being a purpose for which the town, as a corporation, had no authority to raise money by taxation. The objection was there taken, and the force of it was to a certain extent admitted; but it was held not to be a good defense, because, as the court said, "if the assessors are not liable to an action for causing an arrest, or the seizure of property, for the nonpayment of an illegal tax, it is difficult to find any remedy for an injured citizen in cases of this nature." They add, hypothetically, that "if an action would lie against the town, it could only be for the money actually received into the treasury." That was a case, it will be observed, in which the plaintiff's property had been actually taken on a warrant of distress.

Here, perhaps, is the first intimation that an action may be maintained against the town, and of the principle on which it can be maintained. It is that money has been actually brought into their treasury by their unauthorized, and of course illegal, act, which in equity and good conscience they cannot retain; and this, not for the damages caused by the seizure and sacrifice of property distrained, and not for the expenses incurred, but simply for the money, which they have actually received without right. Such a remedy, if it exist at all, can upon principle apply only to a case where a town or city levy money for their own use without authority, and not where they or their officers assess and collect money for the state, county, or school district.

In 1824, an act was passed (St. 1823, c. 138, § 5) having an important bearing on this subject. It provides that the assessors of cities, towns, districts, parishes, or religious societies shall not be made responsible for the assessment of any tax, when thereto required by the constituted authorities thereof; but the liability, if any, shall rest solely with said city, etc., and the assessors shall be responsible only for their own integrity and fidelity. This provision was extended to as-

sessments on school districts by St. 1833, c. 166, and was re-enacted in Rev. St. c. 7, § 44.

The first case, we believe, in which an action for money had and received, to recover back a tax illegally assessed, was maintained, was that of *Sumner v. First Parish in Dorchester*, 4 Pick. 361. That was an action to recover back a parish tax, brought by one who was not a member, and not liable to taxation, so that the tax was wholly unauthorized as against him, and void. The court refer to the statute of 1823, taking away the remedy against assessors, so that, if this action would not lie, the party illegally taxed would be without remedy. The court further added: "Upon common principles, the corporation having received the money of the plaintiff, to which they have no right, and placed it in their treasury, must be liable to refund it in this action."

This was probably the basis upon which many actions have been since brought to recover back money, where the authority on which it is levied is wholly void.

But it is held that this rule cannot apply to voluntary payments, but only in cases where a party has been compelled to pay, by that species of compulsion which the law considers duress. The principle is fully stated and explained in former cases, and is this: That a warrant of distress is in the nature of an execution against a person, where there has been no judgment, and no opportunity to plead or answer, and therefore, if he refuses to pay, and payment is insisted upon, and that on pain of immediate arrest or seizure of goods, the payment cannot be deemed voluntary; and if he is not liable to taxation, such a menace is duress.<sup>6</sup> If, therefore, he pays, with or without protest, to avoid such duress, he may recover the money back, if he is not liable. *Preston v. Boston*, 12 Pick. 7; *Boston & Sandwich Glass Co. v. Boston*, 4 Metc. 181. But these cases go on the assumption that the tax was wholly unauthorized and the assessment, therefore, not irregular only, but void.

One case has been cited, which is supposed to have a contrary bearing, and to hold that part of the tax assessed on a party, for which he is not liable, may be recovered back of the town. *Torrey v. Millbury*, 21 Pick. 64. Perhaps in this case the point was not so much considered as it would have been but for the express admission, by the counsel for the defendants, that the plaintiff was entitled to recover back his proportion of \$100, which the town had no authority to levy, and for which, therefore, he was not liable to be assessed; and it was this proportion for which in fact he had judgment. Perhaps, were such a case again under consideration, it might require a careful revision; but the case was decided upon the ground that the vote for raising the \$100 was unauthorized, and without warrant of law, and that the tax therefore was wholly void. We are not aware that any decided case has

<sup>6</sup> See Rev. Laws Mass. c. 13, § 86, giving to a protest the same effect as to duress.

given sanction to the principle that assumpsit against the town or city will lie to recover back money on the ground of any irregularity, error or mistake, in fact or in law, in the mode of making the assessment. On the contrary, we think it is now definitely settled, by a series of decisions, that in such case the party's only remedy is by application to the assessors for abatement. Rev. St. c. 7, § 37. If the party obtain no satisfactory relief there, he may complain to the county commissioners for a revision. Section 39. And it has recently been decided that if there be any error or mistake, in matter of law, in the proceedings of the commissioners, a writ of certiorari from this court will lie to correct them. *Newburyport v. County Commissioners*, 12 Metc. 211.

Here is an easy, direct, simple and practical remedy given by law, adequate and properly adapted to the case, to be pursued promptly, under proper limitations as to time and course of proceeding, before tribunals specially constituted, and furnished with all the means of affording prompt and efficient relief against all errors, of fact or law, by which a party can be injured by wrong taxation. \* \* \*

<sup>7</sup> See *Swift v. Poughkeepsie*, 37 N. Y. 511 (1868); *Newman v. Supervisors of Livingston Co.*, 45 N. Y. 676 (1871); *Board of Supervisors of Stephenson Co. v. Manny*, 56 Ill. 160 (1870); *Spring v. Hyde Park*, 137 Mass. 554, 50 Am. Rep. 334 (1884).

See *Falls v. City of Cairo*, 58 Ill. 403, 406 (1871): "The precept, which was in the hands of the officer at the time these assessments were paid, did not authorize him to levy upon the goods and chattels of the appellant, but directed him merely to make sale of the lots to satisfy the assessments. In *Bradford v. City of Chicago*, 25 Ill. 411, it was held that the payment of an assessment, made to a collector of taxes while having in his hands a warrant to levy and collect the amount of the assessment of the goods and chattels of the owner, might be considered compulsory, and made under such circumstances as would authorize the party paying the money to recover back the same, if the assessment was illegally made. But it was decided in *Stover v. Mitchell*, 45 Ill. 213, that a levy of an execution upon one's land did not make a case of such duress or compulsion that a payment made to prevent the sale of the land under the execution could be recovered back as a compulsory payment. It was held to be a voluntary payment, and not one made under duress; and it is there said: 'It is insisted that the levy of the execution on Stover's land was the exercise of such compulsion as to interfere with Stover's freedom of action. No case is cited going to this extent, and we venture to say none can be found. In order to render such a payment compulsory, such a pressure must be brought to bear upon the person paying as to interfere in some way with the free enjoyment of his rights of person or property'—citing *Bradford v. City of Chicago*, supra, and *Elston v. City of Chicago*, 40 Ill. 514, 89 Am. Dec. 361. There was here no interference with the plaintiff's free enjoyment of his property, and there would not have been, by making sale of it under the precept. Such sale would not have disturbed his possession of the property. He would then have had two years to redeem from the sale, and if, at the end of that time, the purchaser had obtained his tax deed, and brought his action of ejectment for the recovery of the possession, the illegality of the assessments could have been shown in defense, and the recovery of possession defeated; or, had the plaintiff desired to remove any cloud which might be brought upon his title by such a sale, he could have had his remedy for that purpose. It is very unlike the case of the payment of money, made to avoid the seizure of goods or to gain the possession of them, where there may be a pressing necessity for their immediate use, and, being of a movable and perishable character, any legal



remedy might be inadequate for full protection. The reasons upon which it is held that when a party is compelled, by duress of his person or goods, to pay money for which he is not liable, the payment is not voluntary, but compulsory, and that he may rescue himself from such duress by payment of the money, and afterwards, on proof of the fact, recover it back, do not apply in the case of real estate threatened with such action, as in the present case. And we think the payment of these assessments was not made under such circumstances of constraint and compulsion as to except it from the operation of the legal principle that if a party, with full knowledge of all the facts of the case, voluntarily pays money in satisfaction or discharge of a demand unjustly made on him, he cannot afterwards recover back the money."

Accord: *Detroit v. Martin*, 34 Mich. 170, 22 Am. Rep. 512 (1876); *Lanborn v. County Commissioners*, 97 U. S. 181, 186, 24 L. Ed. 926 (1877).

See *Ætna Insurance Co. v. Mayor, etc.*, of New York, 153 N. Y. 331, 340, 47 N. E. 593, 594 (1897): "We are also of the opinion that the payment of the taxes for 1887 and 1888, under the circumstances disclosed by the evidence, was not voluntary, and hence the amount thereof may be recovered in this action. At the time these payments were made, section 314 of chapter 409 of the Laws of 1882 was in force. That section provides that a tax upon the shares of a bank organized under the laws of the state, or of the United States, shall be and remain a lien thereon from the day when the property was assessed, and, if transferred after that day, the transfer shall be subject to such lien. As this tax became and remained a lien upon the plaintiff's bank stock, even after a transfer, it deprived it of an essential element of its ownership and of its right to transfer it. That being the effect of the imposition of the tax, we think it amounted to such an impounding or duress of the plaintiff's property as to render the payment so far involuntary as to authorize an action for the recovery of the money thus wrongfully received by the defendant. The plaintiff could only establish its right to a full enjoyment of its property by proof of the facts which entitled it to an exemption under the statute of 1886, in an action or proceeding instituted for that purpose, or by payment of the tax. The defendant having, by its unauthorized act, placed the plaintiff in that position, it cannot relieve itself from a liability to refund the amount it thus wrongfully received by asserting that the payment was a voluntary one, or by claiming that the plaintiff might have pursued some other remedy to relieve its property from the lien thus established. The payment was necessary to relieve the plaintiff's property from the lien to which it was made subject by the wrongful acts of the defendant's officers, unless it instituted a proceeding to establish the invalidity of the tax. The plaintiff, to enforce its rights, elected to pay the tax and thus relieve its property from such lien, and then to institute an action to recover the amount it was obliged to pay, instead of commencing a proceeding to set aside the tax. We think the defendant is not in a position to complain because the plaintiff elected to pursue the former instead of the latter remedy, and that the payment cannot be held to be so far voluntary as to deprive the plaintiff of its right to recover the amount of taxes thus wrongfully levied and received by the defendant."

Accord: *Stephan v. Daniels*, 27 Ohio St. 527 (1875).

## SECTION 34.—ACTION AGAINST STATE OR GOVERNMENT

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### ACT OF ILLINOIS OF MARCH 23, 1819.

Laws Ill. 1819, p. 184.

An act directing the mode of bringing suits, by and against the state, counties, townships, and other corporate bodies and for other purposes.

Section 1. It shall and may be lawful for the Auditor of Public Accounts for the state of Illinois to sue for any demand which the people of the state may have a right to claim; and to be sued for any demand against the people of the state; and to sue and be sued, to plead and be impleaded, to answer and be answered, to defend and be defended, in any court of record, or other place where justice shall be judicially administered, in the name of the Auditor of Public Accounts, for the people of the state of Illinois. \* \* \*

Sec. 5. When judgment shall be rendered against the Auditor of Public Accounts for the state of Illinois, [that] it shall be his duty, by his warrant, to draw upon the State Treasurer for the amount of such judgment, and costs, to the time of the rendition thereof, and for no more. And it shall be the duty of the Treasurer to pay the same out of any monies in the treasury not otherwise appropriated. \* \* \* Provided, that if the Auditor, commissioners, or trustees, as aforesaid, fail or refuse to give such warrant, as aforesaid, upon request, execution may issue against either of them, for the amount of such judgment, in his or their natural and private capacity, and be collected in the same manner, except that no replevy shall be allowed upon such execution, as though it had been recovered against him or them in his or their natural and private capacity.<sup>8</sup>

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### ACT OF ILLINOIS OF JANUARY 3, 1829.

Rev. Laws Ill. 1832-33, p. 593.

An act directing the mode of bringing suits, by or against the state.

Section 1. It shall and may be lawful for the Auditor of Public Accounts of the state of Illinois to sue for any demand which the people of the state may have a right to claim, and to be sued and to sue, to plead and to be impleaded, to answer and be answered, to defend and

<sup>8</sup> For earlier legislation, see Act Va. 1778 (9 Hening's St. p. 536), and *Commonwealth v. Beaumarchais*, 3 Call (Va.) 122-180 (1801); also Act Pa. March 30, 1811 (Dunlop's Laws 1700-1849, p. 287, c. 207), and *Fitter v. Com.*, 31 Pa. 406 (1858).

See, also, Blackstone's Commentaries, III, pp. 254-257, as to petition of right.

to be defended, in any court of record, or other place, where justice shall be judicially administered, in the name of the Auditor of Public Accounts, for the people of the state of Illinois: Provided, that the Auditor shall not be liable to be sued in any other county than that in which the seat of government is situated. And the Attorney General of this state shall prosecute and defend all suits brought by or against the Auditor of Public Accounts, as is prescribed by law. From all judgments, so rendered, appeals may be taken to the Supreme Court, and it shall be the duty of the Auditor to take such appeal, if in his opinion justice has not been done in the court where such judgment has been rendered; nor shall any judgment against the Auditor, in his representative capacity, bind him personally, or be conclusive upon the state, until the same shall be examined by the General Assembly. In cases of appeals by the Auditor, he shall not be required to give bond, or security, as in other cases.

Sec. 2. When judgment shall be rendered against the Auditor of Public Accounts for the state of Illinois, it shall be the duty to forward a copy of such judgment, and proceedings thereon, to the next General Assembly, and if approved by the same, an appropriation shall be made to satisfy the same, or such part thereof as said general assembly may deem just.

Sec. 3. The act entitled "An act directing the mode of bringing suits, by and against the state, counties, townships, and other corporate bodies, and for other purposes," approved March 23, 1819, is hereby repealed.

This act to be in force from and after the first day of June next.<sup>9</sup>

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#### CONSTITUTION OF ILLINOIS, 1848, art. 3, § 34.

The General Assembly shall direct by law in what manner suits may be brought against the state.<sup>10</sup>

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#### CONSTITUTION OF ILLINOIS, 1870, art. 4, § 26.

The state of Illinois shall never be made defendant in any court of law or equity.<sup>11</sup>

<sup>9</sup> This act was repealed by Rev. St. 1845, p. 464, c. 90.

<sup>10</sup> No such law appears to have been enacted.

<sup>11</sup> "Appellee, J. M. Mosby, filed his petition for mandamus in the circuit court of Sangamon county October 20, 1914, against the secretary of state, the civil service commission, the state treasurer and the state auditor of public accounts, praying that the secretary of state and the civil service commission be commanded by a writ of mandamus to certify and approve a pay roll for his back salary from August 1, 1913, to April 21, 1914, at the rate of \$800 per year, for doing janitor work in the men's lavatory on the first floor of the capitol building, and that upon such certification the auditor of public accounts be commanded to issue, and the state treasurer to pay, such warrant to the rela-



## ACT OF ILLINOIS OF MAY 29, 1877.

(Laws Ill. 1877, p. 64.)

An act to create a Commission of Claims, and to prescribe its powers and duties. In force July 1, 1877.

Section 1. There shall be, and hereby is created and constituted a commission to be called the "Commission of Claims," which shall be composed of one of the judges of the Supreme Court, who shall be president of said commission, and two judges of the circuit courts of this state. \* \* \*

Sec. 2. It shall be the duty of said commission to hear and determine all unadjusted claims of all persons, against the state of Illinois, and said commission shall hear and determine such claims according to the principles of equity and justice, except as otherwise provided in the laws of this state, and in case said commission shall allow any such claim, they shall make and award in favor of the claimant, finding the amount due to such claimant, and naming the claimant, which said award shall be filed and recorded in the office of the Auditor of Public Accounts, in a book to be kept by him for that purpose. \* \* \*

Sec. 5. The Auditor shall, in his biennial report to the Governor, include a detailed statement of all such awards, and said statement shall be laid before the two houses of the General Assembly at its session held next after the filing of said awards.

tor. \* \* \* The contention that this suit is, in effect, an action against the state for the recovery of damages and that mandamus will not lie cannot be sustained. The fact that no reinstatement to office was asked does not distinguish the right to maintain the action in this case from *People v. Brady*, supra, and *People v. Stevenson*, supra. Mandamus was held the proper action to compel the issue of a warrant in payment for stationery sold the state in *People v. Secretary of State*, 58 Ill. 90 (1871) to pay interest on bonds in *People v. Smith*, 43 Ill. 219, 92 Am. Dec. 109 (1867) and to control the issuance of warrants for the pay of members of the Legislature in *People v. Hatch*, 33 Ill. 9 (1863). "The issuance, signing, or countersigning of a warrant upon the proper fund may be compelled by mandamus where the claim has been duly liquidated, audited, and allowed, or where it clearly appears that the claim is properly due and payable." 19 Am. & Eng. Ency. of Law, 786. The judgment of the circuit court is affirmed." *People ex rel. Mosby v. Stevenson*, 272 Ill. 215, 111 N. E. 595 (1916).

Compare *United States ex rel. Carroll Electric Co. v. McCarl*, 56 App. D. C. 49, 8 F.(2d) 910 (1925).

## ACT OF ILLINOIS OF JUNE 25, 1917.

Laws Ill. 1917, p. 325; Smith-Hurd's Rev. St. 1927, c. 37, §§ 427, 432, 433, 439.

427. Section 1. Be it enacted by the people of the state of Illinois, represented in the General Assembly: The Court of Claims is hereby created. It shall consist of a chief justice and two judges, appointed by the Governor by and with the advice and consent of the Senate. In any case of vacancy in such office during the recess of the Senate, the Governor shall make a temporary appointment until the next meeting of the Senate, when he shall nominate some person to fill such office; and any person so nominated, who is confirmed by the Senate, shall hold his office during the remainder of the term and until his successor is appointed and qualified. If the Senate is not in session at the time this act takes effect, the Governor shall make a temporary appointment as in case of a vacancy.

432. Sec. 6. The Court of Claims shall have power:

(1) To make rules and orders, not inconsistent with law, for carrying out the duties imposed upon it by law;

(2) To make rules governing the practice and procedure before the court which shall be as simple, expeditious and inexpensive as reasonably may be;

(3) To compel the attendance of witnesses before it, or before any notary public or any commissioner appointed by it, and the production of any books, records, papers or documents that may be material or relevant as evidence in any matter pending before it;

(4) To hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the state, as a sovereign commonwealth, should, in equity and good conscience discharge and pay;

(5) To hear and give its opinion on any controverted questions of claims or demand referred to it by any officer, department, institution, board, arm or agency of the state government and to report its findings and conclusions to the authority by which it was transmitted for its guidance and action;

(6) To hear and determine the liability of the state for accidental injuries or death suffered in the course of employment by any employé of the state, such determination to be made in accordance with the rules prescribed in the act commonly called the "Workmen's Compensation Act," the Industrial Commission being hereby relieved of any duty relative thereto.

433. Sec. 7. In case any person refuses to comply with any subpoena issued in the name of the chief justice, attested by the secretary of state, with the seal of the state attached, and served upon the person named therein as a summons at common law is served, the circuit court of the proper county, on application of the secretary of the court, shall compel obedience by attachment proceedings, as for contempt, as in a

case of a disobedience of the requirements of a subpoena from such court on a refusal to testify therein.

439. Sec. 13. The jurisdiction conferred upon the Court of Claims by this act shall be exclusive. No appropriation shall hereafter be made by the General Assembly to pay any claim or demand, over which the Court of Claims is herein given jurisdiction, unless an award therefor shall have been made by the Court of Claims.

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#### UNITED STATES REVISED STATUTES.

Sec. 1059. [Act Feb. 24, 1855.] The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress. [U. S. Comp. St. 1901, p. 734.]

Sec. 1089. In all cases of final judgments by the Court of Claims, or, on appeal, by the Supreme Court, where the same are affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the Court of Claims, and signed by the chief justice, or, in his absence, by the presiding judge of said court. [U. S. Comp. St. 1901, p. 745.]<sup>12</sup>

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#### GERMAN CONSTITUTION, 1918, art. 131.

If an official in the exercise of public authority entrusted to him violates his official duty toward a third party, the responsibility rests in principle upon the state or municipality in whose service he is. Recourse against the official is reserved. The jurisdiction of the regular courts may not be excluded.

See the Prussian Act of August 1, 1909, and the Imperial Act of May 22, 1910.

<sup>12</sup> Act March 2, 1887, c. 359, 24 Stat. 505 (U. S. Comp. St. 1901, p. 752), known as the Tucker act: The provisions of this act are set forth in *U. S. v. Jones*, 131 U. S. 1, 9 Sup. Ct. 669, 33 L. Ed. 90 (1889), post, p. 421.



## LANGFORD v. UNITED STATES.

Supreme Court of United States, 1879. 101 U. S. 341, 25 L. Ed. 1010.

Appeal from the Court of Claims.

Mr. Justice MILLER delivered the opinion of the court.

This suit was brought by the plaintiff against the United States to recover for the use and occupation of certain lands and buildings. The judgment of the Court of Claims was rendered against him, and he appealed here.

The first question arising in this case concerns the jurisdiction of the Court of Claims, upon the suggestion of the Attorney General that the claim is not founded on contract, either express or implied. That court could have no cognizance of the case on any other ground, according to the express language of the statute defining its jurisdiction. Rev. St. § 1059 (U. S. Comp. St. 1901, p. 734).

The findings of the court leave no doubt that the Indian agents acting for the United States, and without the consent of the American Board of Commissioners for Foreign Missions, took possession of the buildings which that board had erected upon the lands, and have since retained them by force and against its will or that of Langford, who claims title under it. The United States always asserted that their possession was by virtue of their own title, which was hostile to that of the claimant. The military of the United States was at one time ordered to protect by force the occupation of the agents.

Conceding that the title, or even the right to the possession of the premises, was in claimant, it would seem that the facts above stated show that the act of the United States in taking and holding that possession was an unequivocal tort, if the government can be capable of committing one, and that if the case were between individuals every implication of a contract would be repelled.

Counsel for claimant, admitting this to be true, makes a very ingenious argument to prove that the government, in taking and using the property of an individual against his consent, and by force, cannot be guilty of a tort, because the nature of the relation of the government to its citizens, and the provisions of the Constitution, create an implied obligation to pay for property, or for the use of property, so taken. The argument rests on two distinct propositions: (1) That the maxim of English constitutional law, that the king can do no wrong, is one which the courts must apply to the government of the United States, and that therefore there can be no tort committed by the government. (2) That by virtue of the constitutional provision that private property shall not be taken for public use, without just compensation, there arises in all cases where such property is so taken an implied obligation to pay for it.

It is not easy to see how the first proposition can have any place in our system of government.

We have no king to whom it can be applied. The President, in the exercise of the executive functions, bears a nearer resemblance to the limited monarch of the English government than any other branch of our government, and is the only individual to whom it could possibly have any relation. It cannot apply to him, because the Constitution admits that he may do wrong, and has provided, by the proceeding of impeachment, for his trial for wrong-doing, and his removal from office if found guilty. None of the eminent counsel who defended President Johnson on his impeachment trial asserted that by law he was incapable of doing wrong, or that, if done, it could not, as in the case of the king, be imputed to him, but must be laid to the charge of the ministers who advised him.

It is to be observed that the English maxim does not declare that the government, or those who administer it, can do no wrong; for it is a part of the principle itself that wrong may be done by the governing power, for which the ministry, for the time being, is held responsible; and the ministers personally, like our President, may be impeached, or, if the wrong amounts to a crime, they may be indicted and tried at law for the offense.

We do not understand that either in reference to the government of the United States, or of the several states, or of any of their officers, the English maxim has an existence in this country.

The other point is one which requires more delicate handling.

We are not prepared to deny that when the government of the United States, by such formal proceedings as are necessary to bind it, takes for public use, as for an arsenal, custom house, or fort, land to which it asserts no claim of title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its just value.

It is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation. And we are not called on to decide that when the government, acting by the forms which are sufficient to bind it, recognizes the fact that it is taking private property for public use, the compensation may not be recovered in the Court of Claims. On this point we decide nothing.

What is pertinent to the present case is that, conceding that principle, it does not confer on that court the authority to decide that the United States, in asserting the right to use its own property, is using that of an individual, and in taking possession of such property under claim of title, and retaining it by force against an opposing claimant, has come under an implied contract to pay him for the use of the property. In the first case, the government admits the title of the individual and his right to compensation. This right to compensation follows from the two propositions, that it was private property and was taken for public use, neither of which is disputed.

It is a very different matter where the government claims that it is dealing with its own, and recognizes no title superior to its own. In such case the government, or the officers who seize such property, are guilty of a tort, if it be in fact private property. No implied contract to pay can arise any more than in the case of such a transaction between individuals. It is conceded that no contract for use and occupation would, in that case, be implied.

Congress, in establishing a court in which the United States may primarily be sued as defendants, proceeded slowly and with great caution. As at first organized, the Court of Claims was merely an auditing board, authorized to pass upon claims submitted to it, and report to the Secretary of the Treasury. He submitted to Congress such confirmed claims as he approved, with an estimate for their insertion in the proper appropriation bill. Such as he disapproved demanded no further action.

It was by reason of that feature of the law that this court refused to exercise the appellate jurisdiction over awards of that court which the act of Congress attempted to confer, because the court was of opinion that the so-called Court of Claims was not, in the constitutional sense, a court which could render valid judgments, and because there could be no appeal from the Supreme Court to the Secretary of the Treasury. *Gordon v. United States*, 2 Wall. 561, 17 L. Ed. 921. An act of Congress removing this objectionable feature having passed the year after that decision, the appellate power of this court has been exercised ever since. The jurisdiction of that court has received frequent additions by the reference of cases to it under special statutes, and by other changes in the general law; but the principle originally adopted, of limiting its general jurisdiction to cases of contract, remains. There can be no reasonable doubt that this limitation to cases of contract, express or implied, was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law.

The reason for this restriction is very obvious on a moment's reflection. While Congress might be willing to subject the government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the government acting under lawful authority, with power vested in him to make such contracts, or to do acts which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one. For such acts, however high the position of the officer or agent of the government who did or commanded them, Congress did not intend to subject the government to the results of a suit in that court. This policy is founded in wisdom, and is clearly expressed in the act defining the jurisdiction of the court; and it would ill become us to fritter away the distinction



between actions *ex delicto* and actions *ex contractu*, which is well understood in our system of jurisprudence, and thereby subject the government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives.

The question is not a new one in this court.

In *Nicholl v. United States*, 7 Wall. 122, 19 L. Ed. 125, where a suit was brought in the Court of Claims to recover back money exacted of an importer in excess of the duties allowed by law, the court held that no contract to refund was implied, because the money, though paid under protest, was paid voluntarily, and for this reason, among others, that court had no jurisdiction.

In *Gibbons v. United States*, 8 Wall. 269, 19 L. Ed. 453, an army contractor, who had agreed to furnish two hundred thousand bushels of oats at a fixed price, had, as this court held, after delivering part of the amount, been legally released from the obligation to deliver the balance. He was, however, carried before the military authority in a state of fear and trepidation and to save himself further trouble agreed to and did deliver the remainder of the oats. He sued in the Court of Claims for the difference between the contract price and the market price of the oats at the time of the delivery. One ground of his claim was that he acted under duress and the constraint of fear, and that his agreement to deliver at the contract price was void.

This court said, in answer to this argument, that "it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the government responsible for the unauthorized acts of its officers, those acts being in themselves torts. \* \* \* The language of the statutes which confer jurisdiction upon the Court of Claims excludes, by the strongest implication, demands against the government founded on torts. The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties. \* \* \* These reflections admonish us to be cautious that we do not permit the decision of this court to become authority for righting in the Court of Claims all wrongs done to individuals by the officers of the general government, though they have been committed while serving the government and in the belief that it was for its interest. In such cases, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination."

With the reaffirmation of this doctrine, which excludes the present case from the jurisdiction of that court, its judgment dismissing the petition of plaintiff is affirmed.<sup>13</sup>

<sup>13</sup> The sovereign is not liable for the tort of his agents, even where consent is given to be sued on any cause of action. *Rexford v. State*, 105 N. Y. 229, 11 N. E. 514 (1887); *Belt v. State of Illinois*, 1 Ill. Court of Claims Rep.

## UNITED STATES v. GREAT FALLS MFG. CO.

[Supreme Court of United States, 1884. 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846.<sup>14</sup>

Mr. Justice HARLAN delivered the opinion of the court. \* \* \*

From the report and documents transmitted to Congress by President Fillmore it appears that, in the judgment of the engineer department, the best mode of supplying the cities of Washington and Georgetown with wholesome water was by an aqueduct from the Great Falls of the Potomac; also, that such a plan necessarily involved the construction of a dam at that point in the river. Ex. Doc. (Senate) No. 48, pp. 2, 35, 48, 32d Cong. 2d Sess. By the annual report, under date of December 4, 1863, of Mr. Usher, Secretary of the Interior, Congress was informed that "certain parties having from time to time made claim to heavy damages for the diversion of the water from the Potomac river," his immediate predecessor, "with a view to settle and end this claim, entered into an agreement of arbitration with the claimants." The parties referred to were the present claimants, as appears by the agreement of arbitration, by the official documents submitted to Congress, and by the proceedings in the courts of Maryland for an assessment of the damages which the proposed dam should cause to the Great Falls Manufacturing Company.

The Secretary said: "Pursuant to this agreement, the arbitrators met from time to time, and finally submitted their award, by which they adjudged in favor of the claimants upon each and all of the plans and modes submitted to them, being three [four] in number, for the construction of the dam across the Potomac, and also \$12,000 for their own fees as arbitrators, and \$761.84 for the expenses

266 (1902). But see *Ballou v. State*, 111 N. Y. 496, 18 N. E. 627 (1888), case of a nuisance caused by property of state.

"A petition of right, unlike a petition addressed to the grace and favor of the sovereign, is founded on the violation of some right in respect of which, but for the immunity from all process with which the law surrounds the person of the sovereign, a suit at law or equity could be maintained. The petition must therefore show on the face of it some ground of complaint which, but for the inability of the subject to sue the sovereign, might be made the subject of a judicial proceeding. Now, apart altogether from the question of procedure, a petition of right in respect of a wrong in the legal sense of the term shows no right to legal redress against the sovereign. For the maxim that the king can do no wrong applies to personal as well as to political wrongs, and not only to wrongs done personally by the sovereign, if such a thing can be supposed to be possible, but to injuries done to a subject by the authority of the sovereign. For from the maxim that the king cannot do wrong it follows as a necessary consequence that the king cannot authorize wrong." *Feather v. Reg.*, 6 B. & S. 257, 295 (1865).

See, further, John M. Maguire, *State Liability for Tort*, 20 *Harv. Law Rev.* 20 (1916); Edwin M. Borchard, *Governmental Responsibility in Tort*, 34 *Yale Law J.* 1 (1924), 36 *Yale Law J.* 1, 757, 1039 (1926-27); also Frederick T. Walton, *French Administrative Courts and the Modern French Law as to the Responsibility of the State for the Faults of its Officials; a Comparison with the Common Law*, 13 *Ill. Law Rev.* 205 (1918).

<sup>14</sup> The statement of facts is omitted.

of arbitration. The sums being large, I did not feel justified in applying the existing appropriation for the completion of the aqueduct to the payment thereof, preferring to submit the whole matter to Congress for its determination. It appears from the report of the experienced engineer in charge of the work, as must be obvious to every observer, that an ample supply of water for the use of the cities of Washington and Georgetown, for many years to come, can be obtained from the Potomac by the erection of a tight dam, extending from the Maryland shore to Conn's Island, to a height which will give a head of six feet in the aqueduct, and yield a daily supply of 65,000,000 gallons," etc. After expressing the opinion that such a dam could not work injury to the proprietors of the water rights claimed at the Great Falls, the Secretary recommended that a reasonable sum be appropriated to pay the expenses of the arbitration, and that the cost previously estimated of a dam across the main channel be diminished to that of the proposed dam over the east channel.

In conformity with that recommendation, Congress, by the act of July 4, 1864, made the appropriation of \$150,000 for the purpose of constructing the proposed dam of solid masonry, and for paying the existing liabilities and the expenses connected with the engineering, superintendence, and repairs of the aqueduct. Immediately thereafter a contract was made for the construction of that dam. In his next annual report, under date of December 5, 1864, the Secretary informed Congress that the work upon the dam and the aqueduct required the expenditure of the additional sum of \$51,945. For that amount an appropriation was promptly made. With the Secretary's report was transmitted to Congress that of the engineer in charge, who stated that "the question of land damages and water rights at the Great Falls still remains unsettled." The dam was completed to its present height in 1867, and is used as an indispensable part of the system by which the cities of Washington and Georgetown have been supplied with water. Beyond doubt the land and the water rights and privileges in question have for nearly 20 years been held and used by officers and agents of the government, without any compensation whatever having been made therefor to the claimant. By what authority have they appropriated to public use the property of the claimant? The answer to this question will determine whether the present demand of the claimant arises out of an implied contract, and therefore enforceable by suit against the United States in the Court of Claims.

It seems clear that these property rights have been held and used by the agents of the United States, under the sanction of legislative enactments by Congress; for the appropriation of money specifically for the construction of the dam from the Maryland shore to Conn's island was, all the circumstances considered, equivalent to an express direction by the legislative and executive branches of the govern-



ment to its officers to take this particular property for the public objects contemplated by the scheme for supplying the capital of the nation with wholesome water.' The making of the improvements necessarily involved the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the government as a taking under its sovereign right of eminent domain, demand just compensation. *Kohl v. U. S.*, 91 U. S. 374, 23 L. Ed. 449. In that view, we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract within the meaning of the statute, which confers jurisdiction upon the Court of Claims of actions founded "upon any contract, express or implied, with the government of the United States."

This case is materially different from *Langford v. U. S.*, 101 U. S. 341, 25 L. Ed. 1010. That was an action in the Court of Claims against the United States to recover for the use and occupation of certain lands and buildings to which the claimant asserted title. It there appeared that, throughout the whole period of such occupation and use, the title of the claimant was disputed by the government and that possession was taken and held by its agents in virtue of a title asserted to be in the United States. The jurisdiction of the Court of Claims was attempted to be sustained upon the ground that the government, in taking and using the property of an individual, against his consent and by force, could not, under the relations between it and the citizen, commit a tort, but was under an implied obligation, created by the Constitution, to pay for the property, or for the use of the property, so taken. This proposition was held to be untenable under the facts of that case, for the reason that, while individual officers of the government might be guilty of a tort, if the property so held by them was in fact private property, yet, if the government never recognized the property as private property, taken by its agents for public use, it could not be held liable for its value as upon implied contract. In the same case it was said: "We are not prepared to deny that when the government of the United States, by such formal proceedings as are necessary to bind it,

takes for public use, as for an arsenal, custom house, or fort, land to which it asserts no title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its just value. It is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation. And we are not called on to decide that when the government, acting by the forms which are sufficient to bind it, recognizes the fact that it is taking private property for public use, the compensation may not be recovered in the court of claims. On this point we decide nothing."

The question thus reserved from decision is substantially the one now presented. In the present case there were, it is true, no statutory proceedings for the condemnation of the claimant's property rights. Such proceedings, as has been stated, were instituted by the United States in one of the courts of Maryland, in which the property rights of the claimant were expressly recognized. But they were abandoned. One reason, perhaps, for such abandonment was that, in the judgment of the officers of the United States, a fair assessment of damages could not be had in the mode prescribed by the Maryland statute. Be this as it may, it is clear, from the record, that the government did not assert title in itself to this property, at the time it was taken. Having abandoned the proceedings of condemnation, the proper officers of the government, in conformity with the acts of Congress, constructed the dam from the Maryland shore to Conn's Island, the doing of which necessarily involved the occupation and use of the property, as contemplated in what was called the fourth plan for bringing water from the Great Falls to Washington and Georgetown. In such a case, it is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an act of Congress, is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose. If the claimant makes no objection to the particular mode in which the property has been taken, but substantially waives it, by asserting, as is done in the petition in this case, that the government took the property for the public uses designated, we do not perceive that the court is under any duty to make the objection in order to relieve the United States from the obligation to make just compensation. In reference to the title which the government will acquire, as the result of this suit, there would seem to be no difficulty. The finding of the court is that the claimant exhibited to the arbitrators a valid title to the lands in question. It does not appear that the company has ever parted with that title; and the finding is that no title except that of the claimant is asserted.

What has been said is sufficient to dispose of the case, and requires an affirmance of the judgment. It is so ordered.

## UNITED STATES v. JONES.

SAME v. TAUBENHEIMER. SAME v. MONTGOMERY.

Supreme Court of United States, 1889. 131 U. S. 1, 9 Sup. Ct. 669, 33 L. Ed. 90.

Appeals from the Circuit Court of the United States for the District of Oregon.

Three suits by Carrie Jones, Henry Taubenheimer, and James B. Montgomery, respectively, against the United States, for specific performance. Demurrers to the petitions overruled, and the United States appeals.

These cases are suits in equity brought against the United States under the recent act of March 3, 1887 (U. S. Comp. St. 1901, p. 752) extending the jurisdiction of claims against the government to the District and Circuit Courts of the United States. They are suits for specific performance, seeking to compel the United States to issue and deliver to the plaintiffs respectively patents for timber land, alleged to have been taken up and purchased by them under the act for the sale of timber lands in the states of California, Oregon, etc., passed June 3, 1878 (20 Stat. 89). The petitions contain averments of performance of the conditions required by said act, the payment of the price of the lands to the receiver of the land office, the giving of his certificates and receipts therefor, and the refusal of the government to issue patents to the petitioners as entitled thereto. They pray in each case for a decree—First, that the petitioner is owner of the land by virtue of the purchase; and, second, that the United States issue and deliver, or cause to be issued and delivered, in accordance with law, a patent granting and conveying the land purchased. The United States, by its attorney, demurred to the several petitions. The Circuit Court overruled the demurrers, and rendered decrees for the plaintiffs. From these decrees the present appeals were taken.

BRADLEY, J. The question involved is whether the act of March 3, 1887, which is entitled "An act to provide for the bringing of suits against the government of the United States" (24 Stat. 505 [U. S. Comp. St. 1901, p. 752]), authorizes suits of the kind like the present, which are brought, not for the recovery of money, but for equitable relief by specific performance, to compel the issue and delivery of a patent. In the case of *U. S. v. Alire*, 6 Wall. 573, 18 L. Ed. 947, we distinctly held that the acts of 1855 and 1863, which established the Court of Claims, and defined its jurisdiction, did not give it power to entertain any such suits as these; and that case was followed by *Bonner v. U. S.*, 9 Wall. 156, 19 L. Ed. 666, and has been approved in subsequent cases. *U. S. v. Gillis*, 95 U. S. 407, 412, 24 L. Ed. 503; *U. S. v. Schurz*, 102 U. S. 378, 404, 26 L. Ed. 167.

It is argued, however, that the new law has extended the jurisdiction of the Court of Claims and the concurrent jurisdiction of the



Circuit and District Courts, or at least the latter, so as to embrace every kind of claim, equitable as well as legal, and specific relief, or a recovery of property, as well as a recovery of money. If such is the legislative will, of course the courts must conform to it, although the management and disposal of the public domain, in which the newly claimed jurisdiction would probably be most frequently called into exercise, has always been regarded as more appropriately belonging to the political department of the government than to the courts, and more a matter of administration than judicature. A careful examination of the statute, and a comparison of its terms with those of the acts of 1855 and 1863, can alone settle the question.

By the first section of the act of 1855 (10 Stat. 612) it was enacted that a court should be established, to be called the "Court of Claims," the jurisdiction of which was defined as follows: "The said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to it by either house of Congress."

The act of March 3, 1863, passed to amend the act of 1855 (12 Stat. 765), added: "That the said court \* \* \* shall also have jurisdiction of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government against any person making claim against the government in said court." Jurisdiction was subsequently given of claims for the proceeds of property captured or abandoned during the Rebellion, and of claims of paymasters and other disbursing officers for relief from responsibility on account of capture of government funds or property in their hands. These latter branches of jurisdiction need not be considered here.

Turning now to the act of March 3, 1887, which re-enacted or revised the previous laws as to the jurisdiction of the Court of Claims, and conferred concurrent jurisdiction for limited amounts on the ordinary courts, we find the following language used:

"The Court of Claims shall have jurisdiction to hear and determine the following matters: First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable. \* \* \* Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court."

"Sec. 2. That the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the Circuit Courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars, and does not exceed ten thousand dollars."

The jurisdiction here given to the Court of Claims is precisely the same as that given in the acts of 1855 and 1863, with the addition that it is extended to "damages \* \* \* in cases not sounding in tort" and to claims for which redress may be had "either in a court of law, equity, or admiralty." "Damages in cases not sounding in tort"—that is to say, damages for breach of contract,—had already been held to be recoverable against the government under the former acts. *U. S. v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168; *U. S. v. Manufacturing Co.*, 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846; *Hollister v. Manufacturing Co.*, 113 U. S. 59, 67, 5 Sup. Ct. 717, 28 L. Ed. 901. "Claims" redressible "in a court of law, equity, or admiralty," may be claims for money only, or they may be claims for property or specific relief according as the context of the statute may require or allow.

The claims referred to in the original statute of 1855, as described in the first section thereof, above quoted, might have included claims for other things besides money; but various provisions of that act and of the act of March 3, 1863, were inconsistent with the enforcement of any claims under the law except claims for money. Thus, in the fifth section of the act of 1863, the right of appeal was limited to cases in which the amount in controversy exceeded \$3,000, and in the seventh section it was provided that if judgment should be given in favor of the claimant, the sum due thereby should be paid out of any general appropriation made by law for the payment of private claims; and, if a judgment was affirmed on appeal, interest was to be allowed thereon, etc.

In the case of *U. S. v. Alire*, 6 Wall. 573, 18 L. Ed. 947, Mr. Justice Nelson, speaking for the court, said: "It will be seen by the above reference which we have made to the two acts of Congress on this subject that the only judgments which the Court of Claims are authorized to render against the government, or over which the Supreme Court have any jurisdiction on appeal, or for the payment of which by the Secretary of the Treasury any provision is made, are judgments for money found due from the government to the petitioner. And although it is true that the subject-matter over which jurisdiction is conferred, both in the act of 1855 and of 1863, would admit of a much more extended cognizance of cases, yet it is quite clear that the limited power given to render a judgment necessarily retains the general terms, and confines the subject-matter to cases in which the petitioner sets up a moneyed demand as due from the

government." The decree of the Court of Claims in that case was that the claimant recover of the government a military land warrant for 160 acres of land, and that it be made out and delivered to him by the proper officer. This court said: "We find no provision in any of the statutes requiring a judgment of this character, whether in this court or in the Court of Claims, to be obeyed or satisfied."

The sections of the act of 1863 referred to in this opinion are still in force, not being repealed by the act of 1887, which only repeals "all laws and parts of laws inconsistent" therewith. Section 5, relating to appeals, is transferred to section 707 of the Revised Statutes (U. S. Comp. St. 1901, p. 574), giving an appeal to this court "where the amount in controversy exceeds \$3,000"; and section 7, relating to the mode of paying judgments out of a general appropriation, and allowing interest where a judgment is affirmed, is contained in sections 1089, 1090 of the Revised Statutes (U. S. Comp. St. 1901, p. 745). These sections are still the law on the subjects to which they relate, being necessary to the completion of the system, and not being supplied by any other enactments. Indeed, they are expressly retained. The fourth section of the act of 1887 declares that "the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable, and not inconsistent with the provisions of this act"; and the ninth section declares "that the plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained." These provisions undoubtedly include the Court of Claims as well as the District and Circuit Courts. So, in relation to interest, section 10 declares that "from the date of such final judgment or decree interest shall be computed thereon at the rate of four per cent. per annum, until the time when an appropriation is made for the payment of the judgment or decree." It seems, therefore, that in the point of providing only for money decrees and money judgments, the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands.

We do not think that it was the intention of Congress to go further than this. Had it been, some provision would have been made for carrying into execution decrees for specific performance, or for delivering the possession of property recovered in kind. The general scope and purport of the act are against any further extension than that here indicated. The expression in the fifth section, referring to "money or any other thing claimed, or the damages sought to be recovered," on which so much reliance is placed by the appellees, cannot outweigh the considerations referred to, and operate to introduce entirely new fields of jurisdiction. It is one of those general expres-



sions which must be restrained by the more special and definite indications of intention furnished by the context.

We cannot yield to the suggestion that any broader jurisdiction as to subject-matter is given to the Circuit and District Courts than that which is given to the Court of Claims. It is clearly the same jurisdiction—"concurrent jurisdiction" only—within certain limits as to amount; and the language in which those limits are expressed furnishes an additional argument in favor of the conclusion which we have reached. It is declared "that the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims \* \* \* where the amount of the claim does not exceed \$1,000," etc. This language is properly applicable only to a money claim. Had anything but money been in the legislative mind the language would have been, "where the amount or value of the thing claimed does not exceed \$1,000," etc.

Of course, our province is construction only; the policy of the law is the prerogative of the legislative department. But, notwithstanding the glowing terms in which able jurists have spoken of the progress of civilization and enlightened government as exhibited in subjecting government itself, equally with individuals, to the jurisdiction of its own courts, we should have been somewhat surprised to find that the administration of vast public interests, like that of the public lands, which belong so appropriately to the political department, had been cast upon the courts—which, it surely would have been, if such a wide door had been opened for suing the government to obtain patents and establish land claims, as the counsel for the appellees in these cases seems to imagine. We are satisfied that the door has not yet been thrown open thus wide.

The decrees of the court are reversed in all the cases, and the causes are respectively remanded, with instructions to dismiss the original petitions or bills.

MILLER, J. (dissenting). I find myself unable to concur with the majority of the court in the construction given by it in the opinion just read to the provisions of the act of March 3, 1887. This act was evidently intended to confer a new and important jurisdiction upon the Court of Claims, and a concurrent jurisdiction, to a limited extent, in the same class of cases, upon the Circuit and District Courts of the United States. I can see no other possible object in that part of the statute which confers this new jurisdiction by the use of language which for the first time in the history of that court authorizes it to take cognizance of claims where the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, than to make them suable in such cases. To hold that the distinct grant of power here provided for is controlled by the fact that this court has under former statutes decided that it did not then exist, is simply to nullify this new grant of power. The manifest purpose of this new act was to confer power

which the Court of Claims did not previously have, and to authorize it to take jurisdiction of a class of cases of which it had not cognizance before. To say that under such circumstances the new statute is to be crippled and rendered ineffectual in the only new feature which it has, in regard to the jurisdiction of that court, is, in my mind, a refusal to obey the law as made by Congress in the matter in which its power is undisputed. It is clear to me that Congress intended by this act to enlarge very materially the right of suit against the United States, to facilitate this right by allowing suits to be brought in the Circuit and District Courts where the parties resided, and that it also designed to enlarge the remedy in the Court of Claims to meet all such cases in law, equity, and admiralty against the United States, as would be cognizable in such courts against individuals.

I am authorized to say that Mr. Justice FIELD agrees with me in this dissent.<sup>15</sup>

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### DOOLEY v. UNITED STATES.

Supreme Court of United States, 1901. 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074.

Mr. Justice BROWN delivered the opinion of the court.

1. The jurisdiction of the court in this case is attacked by the government upon the ground that the Circuit Court, as a court of claims, cannot take cognizance of actions for the recovery of duties illegally exacted.

By an act passed March 3, 1887, to provide for the bringing of suits against the government, known as the Tucker act (24 Stat. 505, c. 359 [U. S. Comp. St. 1901, p. 752]), the Court of Claims was vested with jurisdiction over, "first, all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable"; and by section 2 the District and Circuit Courts were given concurrent jurisdiction to a certain amount.

The first section evidently contemplates four distinct classes of cases: (1) Those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded

<sup>15</sup> In 1892 a bill was passed by Congress conferring jurisdiction in the matter of land patents, but it was vetoed by President Harrison. President's Messages, vol. 9, p. 247, August 3, 1892. See *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123 (1893), post, p. 670; *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074 (1903).

upon a regulation of an executive department; (3) cases of contract, express or implied, with the government; (4) actions for damages, liquidated or unliquidated, in cases not sounding in tort. The words "not sounding in tort" are in terms referable only to the fourth class of cases.

The exception to the jurisdiction is based upon two grounds: First, that the court has no jurisdiction of cases arising under the revenue laws; and, second, that it has no jurisdiction in actions for tort.

In support of the first proposition we are cited to the case of *Nichols v. United States*, 7 Wall. 122, 19 L. Ed. 125, in which it was broadly stated that "cases arising under the revenue laws are not within the jurisdiction of the Court of Claims." The action in that case was brought to recover an excess of duties paid upon certain liquors which had leaked out during the voyage, and, being thus lost, were never imported in fact into the United States. Plaintiffs paid the duties, as exacted, but made no protest, and subsequently brought suit in the Court of Claims for the overpayment. The act in force at that time gave the Court of Claims power to hear and determine "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." The court held, first, that the duties could not be recovered because they were not paid under protest, and, second, that Congress did not intend to confer upon the Court of Claims jurisdiction of cases arising under the revenue laws, inasmuch as, by the act of February 26, 1845 (5 Stat. 727, c. 22), Congress had given a right of action against the collector in favor of persons "who have paid, or shall hereafter pay, money, as and for duties, under protest \* \* \* in order to obtain goods, wares, or merchandise imported by him or them, or on his or their account, which duties are not authorized or payable in part or in whole by law," provided that protests were duly made in writing. It was held that this remedy was exclusive, and that Congress, after having carefully constructed a revenue system, with ample provisions to redress wrong, did not intend to give to the taxpayer and importer a different and further remedy.

Subsequent statutes, however, have so far modified that special remedy that it can no longer be made available, and the broad statement in the *Nichols Case*, that revenue cases are not within the cognizance of the Court of Claims, if still true, must be accepted with material qualifications. By the customs administrative act of 1890, as we have just held in *De Lima v. Bidwell*, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041, an appeal is given from the decision of the collector "as to the rate and amount of duties chargeable upon imported merchandise," to a board of general appraisers, whose decision shall be final and conclusive "as to the construction of the law and the facts respecting the classification of such merchandise and the



rate of duty imposed thereon under such classification," unless application be made for a review to the Circuit Court of the United States. This remedy is doubtless exclusive as applied to customs cases; but, as we then held, it has no application to actions against the collector for duties exacted upon goods which were not imported at all. Such cases, although arising under the revenue laws, are not within the purview of the customs administrative act; as for such cases there is still a common-law right of action against the collector, and we think also by application to the Court of Claims. There would seem to be no doubt about plaintiffs' remedy against the collector at San Juan.

In the Nichols Case it was held that, as there was a remedy by action against the collector, expressly provided by statute, that remedy was exclusive. In *De Lima v. Bidwell* we held that, although no other remedy was given expressly by statute than that provided by the customs administrative act, there was still a common-law remedy against the collector for duties exacted upon goods not imported at all; but it does not therefore follow that this remedy is exclusive, and that the importer may not avail himself of his right of action in the Court of Claims.

But conceding that the Nichols Case does not stand in the way of a suit in the Court of Claims, the government takes the position that a suit in the United States to recover back duties illegally exacted by a collector of customs is really an action "sounding in tort," though not an action "for damages, liquidated or unliquidated," within the fourth class of cases enumerated in the Tucker act.

There are a number of authorities in this court upon that subject which require examination. The question is whether any claim sounding in tort can be prosecuted in the Court of Claims, notwithstanding the words "not sounding in tort," in the Tucker act, are apparently limited to claims for damages, liquidated or unliquidated. The question was first considered in *Langford v. United States*, 101 U. S. 341, 25 L. Ed. 1010, under the statute above cited, giving the Court of Claims power to hear and determine "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." The suit was brought to recover for the use and occupation of certain lands and buildings of which possession had been forcibly taken by agents of the government, against the will of Langford, who claimed title to the lands. It was held that the act of the United States in taking and holding possession was an unequivocal tort, and a distinction was drawn between such a case and one where the government takes for public use lands to which it asserts no claim of title, but admits the ownership to be private or individual, in which class there arises an implied obligation to pay the owner its just value. "It is a very different matter where the government claims that it is dealing with its

own, and recognizes no title superior to its own. In such case the government, or the officers who seize such property, are guilty of a tort, if it be in fact private property." It was held that the limitation of the act to cases of contract, express or implied, "was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law."

The case was rested largely upon that of *Gibbons v. United States*, 8 Wall. 269, 19 L. Ed. 453, in which an army contractor who had agreed to furnish certain oats at a fixed price had, after the delivery of part of the amount, been released from the obligation to deliver the balance. He was, however, carried before the military authority, and, influenced by threats, agreed to deliver, and did deliver, the full quantity of oats specified in the contract. He brought suit for the difference between the contract price and the market price of the oats at the time of delivery. It was said that "if such pressure was brought to bear upon him as would make the renewal of the contract void, as being obtained by duress, then there was no contract, and the proceeding was a tort for which the officer may have been personally liable," but that it was not within the Court of Claims act.

The act of March 3, 1887 (the Tucker act), was first considered by this court in *United States v. Jones*, 131 U. S. 1, 9 Sup. Ct. 669, 33 L. Ed. 90, in which it was held not to confer upon the Court of Claims jurisdiction in equity to compel the issue and entry of a patent for public land, following *United States v. Alire*, 6 Wall. 573, 18 L. Ed. 947, and *Bonner v. United States*, 9 Wall. 156, 19 L. Ed. 666. In delivering the opinion, Mr. Justice Bradley compared the original act with the Tucker act, and held that there was no such difference in language as to justify an equitable jurisdiction to compel the issue of a patent.

In *Hill v. United States*, 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. Ed. 862, it was held that a claim for damages for the use and occupation of land under tide water, for the erection and maintenance of a lighthouse, without the consent of the owner, but not showing that the United States had acknowledged any right of property in him as against them, was a case sounding in tort, of which the Circuit Court had no jurisdiction under the Tucker act. It was said that "the United States cannot be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction, in this respect, between contract and tort, be evaded by framing the claim as upon an implied contract." "An action in the nature of assumpsit for the use and occupation of real estate will never lie where there has been no relation of contract between the parties, and where the possession has been acquired and maintained under a different or adverse title, or where it is tortious and makes

the defendant a trespasser." No distinction was noticed between the phraseology of the original act and the Tucker act, though it seems to have been assumed that the case was one for the recovery of "damages" sounding in tort.

In *Schillinger v. United States*, 155 U. S. 163, 15 Sup. Ct. 85, 39 L. Ed. 108, it was held that the Court of Claims had no jurisdiction of an action upon a claim against the government for the wrongful appropriation of a patent by the United States, against the protest of the patentee. It was said to be an action for damages sounding in tort, and therefore not maintainable. "Not only does the petition count upon a tort, but also the findings show a tort. That is the essential fact underlying the transaction, and upon which rests every pretense of a right to recover. There was no suggestion of a waiver of the tort or a pretense of any implied contract until after the decision of the Court of Claims that it had no jurisdiction over an action to recover for the tort."

In the cases under consideration the argument is made that the money was tortiously exacted; that the alternative of payment to the collector was a seizure and sale of the merchandise for the nonpayment of duties; and that it mattered not that at common law an action for money had and received would have lain against the collector to recover them back. But whether the exactions of these duties were tortious or not, whether it was within the power of the importer to waive the tort and bring suit in the Court of Claims for money had and received, as upon an implied contract of the United States to refund the money in case it was illegally exacted, we think the case is one within the first class of cases specified in the Tucker act, of claims founded upon a law of Congress, namely, a revenue law, in respect to which class of cases the jurisdiction of the Court of Claims, under the Tucker act, has been repeatedly sustained.

Thus, in *United States v. Kaufman*, 96 U. S. 567, 24 L. Ed. 792, a brewer who had been illegally assessed for a special tax upon his business was held entitled to bring suit in the Court of Claims to recover back the amount, upon the ground that no special remedy had been provided for the enforcement of the payment, and consequently the general laws which govern the Court of Claims may be resorted to for relief, if any can be found applicable to such a case. This is upon the principle that a liability created by statute without a remedy may be enforced by a common-law action. The *Nicholas Case* was distinguished upon the ground that the statute there had provided a special remedy.

So, too, in *United States v. Real Estate Sav. Bank*, 104 U. S. 728, 26 L. Ed. 908, the Court of Claims was held to have jurisdiction of a suit to recover back certain taxes and penalties assessed upon a savings bank.

In *Campbell v. United States*, 107 U. S. 407, 2 Sup. Ct. 759, 27 L. Ed. 592, it was held that a party claiming to be entitled to a drawback



of duties upon manufactured articles exported might, when payment thereof has been refused, maintain a suit in the Court of Claims, because the facts found raised an implied contract that the United States would refund to the importer the amount he had paid to the government. There was here no question of tort.

In *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846, it was held, following the observation of Mr. Justice Miller in *Langford v. United States*, that where property to which the United States asserts no title was taken by their officers or agents, pursuant to an act of Congress, as private property for public use, there was an implied obligation to compensate the owner, which might be enforced by suit in the Court of Claims.

So, too, in *Hollister v. Benedict & B. Mfg. Co.*, 113 U. S. 59, 5 Sup. Ct. 717, 28 L. Ed. 901, it was held that a suit might be maintained in the Court of Claims to recover for the use of a patented invention, if the right of the patentee were acknowledged. To the same effect are *United States v. Palmer*, 128 U. S. 262, 9 Sup. Ct. 104, 32 L. Ed. 442, and *United States v. Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 15 Sup. Ct. 420, 39 L. Ed. 530.

In *Medbury v. United States*, 173 U. S. 492, 19 Sup. Ct. 503, 43 L. Ed. 779, it was held the Court of Claims had jurisdiction of an action to recover an excess of payment for lands within the limits of a railroad grant which grant was, subsequent to the payment, forfeited by act of Congress for nonconstruction of the road.

In *Swift & C. & B. Co. v. United States*, 111 U. S. 22, 4 Sup. Ct. 244, 28 L. Ed. 341, the same right was treated as existing in favor of a party who sued for a commission upon the amount of certain adhesive stamps which he had at one time purchased for his own use from the Bureau of Internal Revenue. See, also, *United States v. Lawson*, 101 U. S. 164, 25 L. Ed. 860; *United States v. Mosby*, 133 U. S. 273, 10 Sup. Ct. 327, 33 L. Ed. 625. \* \* \* <sup>16</sup>

<sup>16</sup> "The argument that there is a distinction between claims 'arising under' (Judicial Code, § 24[1]), and those 'founded upon' (section 24[20]), a law of the United States rests on the inadmissible premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye. *Dooley v. United States*, 182 U. S. 222 [21 S. Ct. 762, 45 L. Ed. 1074 (1901)]." *United States v. Emery, etc., Co.*, 237 U. S. 28, 32, 35 S. Ct. 499, 500, 59 L. Ed. 825 (1915)

## TEMPEL v. UNITED STATES.

Supreme Court of United States, 1918. 248 U. S. 121, 39 S. Ct. 56, 63 L. Ed. 162.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The Chicago river, its branches and forks lie wholly within the state of Illinois. Their aggregate length is about 35 miles. Originally the stream was a sluggish creek, nearly stagnant during much of the year and, in part, navigable only for rowboats and canoes or for floating of logs. The United States surveyed the river in 1837, but made no improvement above its mouth until 1896. Before the latter date, however, extensive improvements had been made from time to time by the city and by riparian owners. The river had become the inner harbor of Chicago and, measured by its tonnage, was one of the most important waterways of the globe. In number of arrivals and departures of vessels it led all the harbors of the United States. In tonnage it was second only to New York.

In 1896 Congress made an appropriation "for improving the Chicago river, in Illinois, from its mouth to the stock yards on the South branch and to Belmont avenue on the North branch, as far as may be permitted by existing docks and wharves, to be dredged to admit passage by vessels drawing sixteen feet of water." Act of June 3, 1896, c. 314 (29 Stat. 202, 228). This act was amended by the Act of June 4, 1897, c. 2 (30 Stat. 11, 47), which, as interpreted by the War Department, permitted a slight widening of the stream in certain places. The General Assembly of Illinois by resolution of April 22-23, 1897, gave assent of the United States acquiring by purchase or condemnation "all lands necessary for widening the Chicago river and its branches." In 1899 Congress directed a survey with a view to creating a deeper channel and adopting 21 feet "as the project depth for the improvement in lieu of that fixed by the Act of June third, eighteen hundred and ninety-six." Act of March 3, 1899, c. 425 (30 Stat. 1121, 1156). No widening beyond the banks of the *de jure* stream was specifically authorized by this act, nor by any subsequent act. From time to time other appropriations were made by Congress for these improvements of the river, and work was carried on thereunder. About 12.5 miles of the river was improved by the government; and of this about 5 miles consisted of that part of the North branch which lies between the main river and Belmont avenue.

Early in 1889 Tempel became the owner of certain land on the bank of the North branch below Belmont avenue. He leased his land for a brickyard; and by the terms of the lease the lessee was permitted to dredge the bottom of the river in front of the premises for the purpose of making brick from the clay thereunder. But the lessee was directed not to interfere with the upland; and he covenanted to deliver up the premises in the condition in which they were demised. Nevertheless, from time to time during a period of five years between 1889 and 1899,

the lessee dug away, to a depth of from 6 to 14 feet, a large strip of the upland, extending in some places to a considerable width. In its natural state the stream opposite the plaintiff's property varied in width from probably 50 to 150 feet, and could be used only for floating logs and for travel by rowboats or canoes; but before 1889 riparian owners had dug a channel and possibly greatly widened the stream, and schooners navigated to a point beyond Belmont avenue. Between 1890 and 1899 boats drawing 5 to 8 feet of water were navigating the North branch up to Belmont avenue. In 1896 the river in front of Tempel's property was in varying depths of from 6 to 14 or 15 feet.

The United States did not do any dredging in front of Tempel's property until 1899. Then it dredged a channel to the depth of 17 feet, about 30 feet wide—the excavation being made wholly in the then bed of the stream as submerged. Its next dredging there was in 1909 when this channel was deepened to 21 feet and widened to 60 feet, the excavation being again made wholly in the then bed of the stream as submerged. All of the dredging, both in 1899 and in 1909, which was not within the bed of the river in its natural state, was done within the limits of the strip of upland which had been submerged through the dredging done by the lessee prior to 1899. During the period from 1889 to 1899, the stream in front of Tempel's premises was in constant and increasing use for the purpose of public navigation. The government does not appear to have had knowledge of the fact that dredging had been done before 1899 by the lessee without the consent of Tempel or that the river had been widened by excavation. The reports of the Secretary of War show that he never specifically authorized, for the purpose of widening the river, the appropriation of any of the property herein involved and that the government believed, when it dredged in front of Tempel's property in 1899 and again in 1909, that the submerged land, in which the dredging was done, was either a part of the natural bed of the river, or that it had been dedicated by the owner for purposes of navigation, or that it had in some other manner become a part of the *de jure* stream.<sup>17</sup> No objection was made by Tempel, until 1910, to the use, for navigation, of the river in front of his property; and he did not file any complaint as to the dredging

<sup>17</sup> Reports, War Department, Engineers, for 1899, pp. 2828-2833; for 1900, pp. 3785-3788; for 1901, pp. 2993, 2995; for 1905, p. 545, show that, in the dredging under the project of 1896, the effort had been to secure title to all property necessary for the proposed development and that it was believed that (with exceptions not here material) this had been done. The property here involved was not included in the land which it was proposed to acquire. The reports also show that the government was not aware that there was any property of a private owner which it was necessary to acquire in order to make the further improvement according to the 21-foot project; and in the accounting of the division of funds between different objects, none were assigned to the securing of land for widening the river. Reports, War Department, Engineers, for 1907, p. 627; for 1908, p. 672; for 1909, p. 709; for 1910, pp. 784-785; for 1911, p. 842; for 1912, p. 1009; for 1913, p. 1119; for 1914, pp. 1157-1160. Nowhere does it appear that the Secretary of War ever authorized the taking of the property involved in this suit.—[*Note by judge.*]



of 1899. He had no knowledge, until 1910, of the dredging which had been done by his lessee, nor of that done by the government.

Promptly after learning of the dredging, Tempel demanded of the government possession of that part of the land submerged which had formerly constituted a part of his upland. The demand was refused; and in 1911 he brought, in the District Court of the United States for the Northern District of Illinois, this suit, under the Tucker Act (Judicial Code, § 24, par. 20; Comp. St. 1916, § 991 [20]), to recover the value of property which he claimed had been taken by the government. The complaint alleged that the river in front of his premises was, at the time he acquired the same and theretofore, a creek used only for surface drainage and was "not a navigable stream either in law or in fact"; that the government "in the latter part of the year 1909 completely excavated a channel through the same" for the purpose of making said North branch navigable; and that it holds possession thereof by virtue of the resolution of the General Assembly of Illinois above referred to; and that the reasonable value of the property taken was \$10,000. The complaint did not refer either to the dredging done before 1889, when Tempel acquired the property, or to that done between 1889 and 1899 by Tempel's lessee, or to that done in 1899 by the government. The answer denied that the stream in front of Tempel's land was nonnavigable when he purchased it or theretofore; asserted that all excavations by the government were made in the center of the stream and were for the purpose of improving navigation; and denied that it had taken any of Tempel's property under the resolution of the Illinois Assembly or otherwise.

The trial court found as a fact: "That by reason of the changes in said river as aforesaid, the difference between the value of the premises of the petitioner at the time when he purchased the same as aforesaid, and the value of the same at the time that the demand as hereinbefore set forth was made, less the cost of reclaiming the same, were he entitled to make reclamation thereof, is \$7,547.00."

As conclusions of law the trial court found that the North branch was navigable in its natural state; that it was navigable in fact as early as 1889; that Tempel, having failed to complain of the use by the public of the stream in front of his property for a period of at least ten years prior to the first dredging by the United States, was estopped from thereafter disputing the navigability of the river; and that the river being then a navigable stream, the dredging of the bed in 1899 and in 1909 did not constitute a taking of Tempel's property within the meaning of the Fifth Amendment. Judgment was entered for the United States; and the case comes here on writ of error.

First. This is a suit, like *United States v. Lynah*, 188 U. S. 445, 23 S. Ct. 349, 47 L. Ed. 539, and *United States v. Cress*, 243 U. S. 316, 37 S. Ct. 380, 61 L. Ed. 746, to recover the value of property taken by the government in making a river improvement. The property alleged to have been taken is land, part of which lies within

the 30-foot channel first dredged by the government in 1899; the balance within the additional 30 feet dredged by it in 1909, when the channel was widened to 60 feet; and all of which formed part of the river bed and was submerged when the government commenced its improvement and has been since. But the property of Tempel, if any, which the government has taken is only the right to keep his land submerged, to navigate over it, and to improve it further for purposes of navigation. This right in the land the government claimed and claims that it already possessed at the time when it dredged on the property in question; and it is the same right which the government possesses in that portion of the present river bed lying within the original meander lines and which originally constituted the whole river bed. Under the law of Illinois, neither the United States nor the state owns the lands under a navigable river. Riparian owners own the fee to the middle of the stream (*St. Louis v. Rutz*, 138 U. S. 226, 242, 11 S. Ct. 337, 34 L. Ed. 941), subject to the paramount right of the government to use the same and to make improvements therein for purposes of navigation, without the payment of compensation (*West Chicago Railroad v. Chicago*, 201 U. S. 506, 520, 26 S. Ct. 518, 50 L. Ed. 845; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 62, 33 S. Ct. 667, 57 L. Ed. 1063; *Willink v. United States*, 240 U. S. 572, 580, 36 S. Ct. 422, 60 L. Ed. 808). Included in such permissible improvement is dredging for the purpose of deepening the channel. *Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82, 33 S. Ct. 679, 57 L. Ed. 1083, Ann. Cas. 1915A, 232. It is only this right to use and improve for purposes of navigation that the government claims here, a right which the government undoubtedly possessed, if the land in question had been a part of the bed of the de jure stream, as was supposed.

If the plaintiff can recover, it must be upon an implied contract. For, under the Tucker Act, the consent of the United States to be sued is (so far as here material) limited to claims founded "upon any contract, express or implied"; and a remedy for claims sounding in tort is expressly denied. *Bigby v. United States*, 188 U. S. 400, 23 S. Ct. 468, 47 L. Ed. 519; *Hijo v. United States*, 194 U. S. 315, 323, 24 S. Ct. 727, 48 L. Ed. 994. As stated in *United States v. Lynah*, 188 U. S. 445, 462, 465, 23 S. Ct. 349, 354 (47 L. Ed. 539): "The law will imply a promise to make the required compensation, where property to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses."

Or in other words: "Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor."

But in the case at bar, both the pleadings and the facts found preclude the implication of a promise to pay. For the property applied to the public use is not and was not conceded to be in the plaintiff.

Second. The answer, specifically denying that the United States has taken plaintiff's land, excavated a channel through it, and claims posses

sion thereof under the resolution of the Illinois Assembly or otherwise, asserts that in 1909 it did "excavate a channel in the Chicago river in the center of the stream and now claims possession thereof for the purpose of making more navigable the North branch." The findings of fact made by the trial court (amplified by the reports of the Secretary of War, of which we take judicial notice) show that the government claimed at the time of the alleged taking and now claims that it already possessed, when it made its excavation in 1909, the property right actually in question. It is unnecessary to determine whether this claim of the government is well founded. The mere fact that the government then claimed and now claims title in itself and that it denies title in the plaintiff, prevents the court from assuming jurisdiction of the controversy. The law cannot imply a promise by the government to pay for a right over, or interest in, land, which right or interest the government claimed and claims it possessed before it utilized the same. If the government's claim is unfounded, a property right of plaintiff was violated; but the cause of action therefor, if any, is one sounding in tort; and for such, the Tucker Act affords no remedy. *Hill v. United States*, 149 U. S. 593, 13 S. Ct. 1011, 37 L. Ed. 862, which both in its pleadings and its facts bears a strong resemblance to the case at bar, is conclusive on this point. See also, *Schillinger v. United States*, 155 U. S. 163, 15 S. Ct. 85, 39 L. Ed. 108.

The case at bar is entirely unlike both the *Lynah Case* and the *Cress Case*. In neither of those cases does it appear that, at the time of taking, there was any claim by the government of a right to invade the property in question without the payment of compensation. Under such circumstances it must be assumed that the government intended to take and to make compensation for any property taken, so as to afford the basis for an implied promise. And when the implied promise to pay has once arisen, a later denial by the government (whether at the time of suit or otherwise) of its liability to make compensation does not destroy the right in contract and convert the act into a tort. In both of those cases the facts required the implication of a promise to pay. But here the government has contended since the beginning of the improvement that, at the time of the dredging in 1899 and in 1909, it possessed the right of navigation over the land in question; which right of navigation, if it existed, gave it the right to dredge further in order to improve navigation. The facts preclude implying a promise to pay. If the government is wrong in its contention, it has committed a tort. The United States has not conferred upon the District Court jurisdiction to determine such a controversy. See *Cramp & Sons v. Curtis Turbine Co.*, 246 U. S. 28, 40, 41, 38 S. Ct. 271, 62 L. Ed. 560.

The District Court, instead of rendering judgment for the United States, should have dismissed the suit for want of jurisdiction.

Judgment reversed and case remanded to the District Court, with directions to dismiss it for want of jurisdiction.

Mr. Justice McREYNOLDS took no part in the consideration and decision of this case.



## · UNITED STATES v. LYNNAH et al.

Supreme Court of the United States, 1903. 188 U. S. 445, 23 S. Ct. 349, 47 L. Ed. 539.<sup>18</sup>

Mr. Justice BROWN (concurring). I concur in the opinion of the court, both with respect to its jurisdiction and the merits of the case, but I am unable to assent to the ground upon which our jurisdiction is rested. While I think the overflowing of the lands in controversy constitutes a taking within the meaning of the 5th Amendment to the Constitution, I see no reason for holding that there was an implied contract to pay for them within the meaning of the Tucker Act. The taking appears to me an ordinary case of trespass to real estate, containing no element whatever of contract. In such case there can be no waiver of the tort. *Jones v. Hoar*, 5 Pick. 285; *Smith v. Hatch*, 46 N. H. 146.

But I think our jurisdiction may be supported, irrespective of the question of contract or tort, under that clause of the Tucker Act which vests the court of claims with jurisdiction of "all claims founded upon the Constitution of the United States or any law of Congress."

As we had occasion to remark in *Dooley v. United States*, 182 U. S. 222-224, 45 L. Ed. 1074, 1078, 21 S. Ct. 762, the first section of the Tucker Act [24 Stat. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752], evidently contemplates four distinct classes of cases: (1) Those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded upon a regulation of an executive department; (3) cases of contract, express or implied, with the government; (4) actions for damages, liquidated or unliquidated, in cases *not sounding in tort*. The words "not sounding in tort" are in terms referable only to the fourth class of cases.

In my view, claims founded upon the Constitution may be prosecuted in the court of claims, whether sounding in contract or in tort; and wherever the United States may take proceedings in eminent domain for the condemnation of lands for public use, the owner of such lands may seek relief in the court of claims if his lands be taken without such proceedings, whether such taking be tortious or by virtue of some contract, express or implied to that effect. That the case under consideration is one of that class is made clear by Act April 24, 1888 (25 Stat. 94, c. 194, U. S. Comp. Stat. 1901, p. 3525), which enacts "that the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate, or prosecute works for the improvement of rivers and harbors for which provision has been made by law; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted."

<sup>18</sup> Mr. Justice Brewer delivered the opinion of the court, which is omitted.

I fully concur in the opinion of the court that "the government may take real estate for a postoffice, a courthouse, a fortification, or a highway, or in time of war it may take merchant vessels and make them part of its naval force," but this cannot be "done without an obligation to pay for the value of that which is so taken and appropriated." I am also of opinion that whenever in the exercise of its governmental rights it takes property the ownership of which it concedes to be in an individual, it is bound to pay therefor, but I do not think that there is any distinction between cases where the government impliedly promises to pay by taking property with the assent of the owner, and those where it takes property forcibly and against the will of the owner. It does not seem reasonable to hold that, where the invasion of the owner's right to property is the greater, his remedy for the recovery of its value should be less, and that he should be compelled to resort to the tedious and unsatisfactory method of appealing to the bounty of Congress for relief.

Suppose, for instance, in time of war and under threat of invasion it seizes upon vessels without the consent of the owner and against his protest. There is certainly the same moral obligation to pay for them as if they had been appropriated with his consent, and I see no reason why an action for their value may not be maintained in the court of claims. Yet, as I understand the opinion of the court in this case, it holds indirectly, if not directly, that no such action would lie unless the property were taken with the consent of the owner and under an implied contract to pay for it. The consequences of recognizing such distinctions seem to me so serious that nothing short of clear language in the statute will justify it.

None such is even hinted at in *United States v. Russell*, 13 Wall. 623, 20 L. Ed. 474, one of the earliest cases, wherein the owner of three steamers seized under "imperative military necessity" sought to recover compensation for their services. These steamers were impressed into the public service and employed as transports for carrying government freight for a certain length of time, when they were returned to the owner. He was held entitled to recover, the court holding that "extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity, in time of war, or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may be even destroyed without the consent of the owner." The case followed that of *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75, and was distinguished from that of *Filor v. United States*, 9 Wall. 45, 19 L. Ed. 559.

While the cases reported prior to 131 U. S. are based upon the original court of claims act, which limited the jurisdiction of that court to "claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the government of the United States," and are therefore not strictly pertinent under the Tucker Act, that of the Great Falls Mfg.

Co., 112 U. S. 645, 28 L. Ed. 846, 5 S. Ct. 306, is almost exactly in point, and is strongly corroborative of the position here taken. This was a claim for land taken at the Great Falls of the Potomac in the construction of an aqueduct for bringing water to Washington. Proceedings were taken in Maryland for condemnation, which were discontinued, and the government took possession of the land. Whether such possession was taken with or without the consent of the owner does not appear, although there had been negotiations between the parties. The claimant was held to be entitled to recover upon the ground that the appropriation of the money for the construction of the improvements was equivalent to an express direction by Congress to take this particular property for the objects contemplated by the scheme, and that there was no sound reason why the claimant might not waive any right he might have to an injunction, and elect to regard the action as a taking by the government under its sovereign right of eminent domain, and therefore demand compensation. The case was not put upon the ground that the owner had consented to the taking.

In *Langford's Case*, 101 U. S. 341, 25 L. Ed. 1010, the action was brought to recover for the use and occupation of certain lands and buildings to which the claimant asserted title, which were seized for the use of the government under claim that they were public property. It was admitted that if the government takes property for public use, acknowledging its ownership to be private or individual, there arises an implied obligation to pay the owner its value; but that it was a different matter when the government claimed the property as its own and recognized no superior title. This was also the case in *Hill v. United States*, 149 U. S. 593, 37 L. Ed. 862, 13 S. Ct. 1011, where the government erected a lighthouse upon submerged land which it claimed as its own. The case was held to be governed by that of *Langford*.

None of the more recent cases under the Tucker Act conflicts with the position here taken: That wherever the United States may proceed to condemn property under its sovereign right of eminent domain, the owner may maintain a petition in the court of claims to recover its value, in case no such proceedings are taken. That act (24 Stat. 505, c. 359, U. S. Comp. Stat. 1901, p. 752), first introduced among the cognizable claims all such as were founded upon the Constitution of the United States, and also introduced, after the words "for damages, liquidated or unliquidated," the words "in cases not sounding in tort." Construing this statute, it was held in the *Jones Case*, 131 U. S. 1, 33 L. Ed. 90, 9 S. Ct. 669, that it did not confer jurisdiction in equity to compel the issue and delivery of a patent for public land; and in *Schillinger's Case*, 155 U. S. 163, 39 L. Ed. 108, 15 S. Ct. 85, that the owner of a patent which had been infringed by the United States could not recover damages for such infringement in the court of claims, though it would be otherwise if the property had been appropriated with the consent of the patentee and in view of compensation therefor. Although there was in *Schillinger's Case* an appropriation of the right



of a patentee to the monopoly of his invention, the case was nothing more in its essence than the infringement of a patent, and so the action was really one for damages sounding in tort. While it is possible an individual might be able to condemn the patentee's right by proceedings in eminent domain, that remedy would be at least doubtful, when the government sought merely to appropriate so much of it as was necessary for its own use. It would be an unprecedented exercise of the right of eminent domain, and could scarcely be held to be a claim arising under the Constitution.

The case was not put upon the ground that it was such a case, but that it was merely an action to recover damages for infringement. Said the court: "It is plainly and solely an action for an infringement" and one sounding in tort. The question whether it was a claim arising under the Constitution was not considered, except in the dissenting opinion of Mr. Justice Harlan, who said: "The constitutional obligation cannot be evaded by showing that the original appropriation was without the express direction of the government, nor by simply interposing a denial of the title of the claimant to the property, or property rights alleged to have been appropriated." If there were any doubt in that case of the power of the government to condemn the right of the patentee by proceedings in eminent domain, there is certainly none such in this case, where the land was taken by the government with no pretense of consent by the owner.

I think it is going too far to hold that the words of the Tucker Act, "not sounding in tort," must be referred back to the first class of cases, namely, "those founded upon the Constitution," and that they should be limited to actions for damages, liquidated or unliquidated, and hence, the consent of the owner cuts no figure in this case. I freely admit that, if property were seized or taken by officers of the government without authority of law, or subsequent ratification, by taking possession or occupying property for public use, there could be no recovery, since neither the government nor any other principal is bound by the unauthorized acts of its agents. But in endeavoring to raise an implied contract to pay for an ordinary trespass to real estate, I think the opinion of the court misconceives the true source of our jurisdiction.

Mr. Justice SHIRAS and Mr. Justice PECKHAM concurred in the above opinion in so far as it holds that the court had jurisdiction on the ground stated therein, as well as upon the ground stated in the opinion of the court.

Mr. Justice WHITE, with whom concurs Mr. Chief Justice FULLER and Mr. Justice HARLAN, dissented. \* \* \* 19

<sup>19</sup> Action to recover property in the possession of an officer and held by him on behalf of the government: *Carr v. United States*, 98 U. S. 433, 437, 438, 25 L. Ed. 209 (1878); *United States v. Lee*, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171 (1882); *Tindal v. Wesley*, 167 U. S. 204, 17 S. Ct. 770, 42 L. Ed. 137 (1897); *Herr v. Central Kentucky Lunatic Asylum*, 97 Ky. 458, 30 S. W. 971, 28 L. R. A. 394, 53 Am. St. Rep. 414 (1895); *Saranac Land & Timber Co. v. Roberts*, 195 N. Y. 303, 88 N. E. 753 (1909).

## CHAPTER 8

MANDAMUS

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SECTION 35.—NATURE AND FORM OF PROCEEDING  
AND PRACTICE

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BLACKSTONE'S COMMENTARIES, BOOK III, p. 110.

A Writ of Mandamus is, in general, a command issuing in the king's name from the Court of King's Bench,<sup>1</sup> and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposes, to be consonant to right and justice.

It is a high prerogative writ, of a most extensively remedial nature and may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution to an office;<sup>2</sup> but it issues in all cases where the party hath a right to have anything done, and hath no other specific means of compelling its performance. A mandamus therefore lies to compel the admission or restoration of the party applying to any office or franchise of a public nature, whether spiritual or temporal; to academical degrees; to the use of a meeting-house, etc. It lies for the production, inspection, or delivery of public books and papers; for the surrender of the regalia of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; and for an indefinite number of other purposes, which it is impossible to recite minutely.

<sup>1</sup> As to the courts which issue Mandamus, see *School Inspectors of Peoria v. People*, 20 Ill. 525 (1858), and note 58 L. R. A. 333.

<sup>2</sup> See *King v. Wheeler, Lee temp. Hardwicke*, 99 (1735).

## CODE OF PRACTICE OF GEORGIA OF 1895.

Sec. 4867. All official duties should be faithfully fulfilled, and whenever from any cause, a defect of legal justice would ensue from a failure or improper fulfillment, the writ of mandamus may issue to compel a due performance, if there be no other specific legal remedy for the legal rights.)

Sec. 4868. Mandamus does not lie as a private remedy between individuals to enforce private rights, nor to a public officer who has an absolute discretion to act or not, unless there is a gross abuse of such discretion; but it is not confined to the enforcement of mere ministerial duties.

A STATE ex rel. ATCHISON, T. & S. F. R. CO. v. BOARD OF COM'RS OF JEFFERSON COUNTY.

Supreme Court of Kansas, 1873. 11 Kan. 66.

VALENTINE, J. This is an original proceeding in mandamus, brought in the name of the state of Kansas, on the relation of the Atchison, Topeka & Santa Fé Railroad Company, against the board of county commissioners of Jefferson county, to compel said county commissioners to issue certain bonds of said county to said railroad company. The defendants move to dismiss the action, because the affidavits, motion, and alternative writ show that the state of Kansas has no interest in the result of the action, and because it does not appear from any of the proceedings that the railroad company have any right to prosecute the action in the name of the state. It is admitted on the part of the railroad company that the state has no interest in the result of the action, and that the railroad company have no right to prosecute the action in the name of the state, or to use the name of the state as plaintiff, unless they have such right by virtue of this being a proceeding in mandamus, and by virtue of the railroad company being the relator therein.

We think the motion to dismiss the action should be sustained. The action of mandamus, as well as every other civil action, should under the statutes of Kansas, where no special provision is otherwise made, be brought and prosecuted in the name of the real party in interest. State ex rel. Wells v. Marston, 6 Kan. 524, 532. It will be conceded that this was not the rule with regard to mandamus at common law.

At common law the proceeding by mandamus was in no sense an action by the relator. Neither the writ nor the return was in any case nor in any sense a pleading. No issues of fact were raised by the writ and the return. No trial could be had in the case, and, no final judgment could be rendered therein between the parties—the relator and the respondent. The writ, whether alternative or peremptory, was merely a writ, and nothing more. It was purely a prerogative writ, solely



within the discretion of the court (never a writ of right), and was issued in the king's name, or in the name of the sovereign authority, commanding some particular act to be done. The return was merely an answer made by the respondent to the writ, stating that he had performed the act, or giving some excuse or justification why he had not performed it. It was never a pleading, and could never be traversed or controverted by the relator, or by any one else, but was always taken as absolutely true, however false it might be in its statements of fact.<sup>3</sup> The only remedy that the relator had when he wished to controvert the truth of the return was to institute a separate and independent action on the case for a false return. In such an action the relator became the plaintiff, the respondent became the defendant, the proper pleadings were filed by the parties, the proper issues were made up, the proper trial was had, and the proper judgment was rendered in the action between the parties. If the judgment was for the plaintiff, he recovered his damages and costs (Tidd's Practice, 949), and the court then issued a peremptory writ of mandamus against the defendant. If the judgment was for the defendant, he recovered his costs.

The law of mandamus as hereinbefore stated, and the subsequent action on the case for a supposed false return, was the law in England down to the passage of the statute of 9 Anne, c. 20,<sup>4</sup> which statute, together with the subsequent statutes passed in England regulating the proceeding by mandamus, form no part of the common law in this country. *K. P. Rly. Co. v. Nichols*, *Kennedy & Co.*, 9 Kan. 252, 12 Am. Rep. 494; *Comp. Laws* 1862, p. 678; *Gen. St.* 1868, p. 1127, par. 3. For the common law of mandamus, see *Bacon's Abr.* "Mandamus"; *Comyn's Dig.* "Mandamus"; *Jacob's Law Dic.* "Mandamus"; *Stephen's Nisi Prius*, "Mandamus." But this old common-law mode or procedure for mandamus has been materially changed by statute, not only in Kansas, but in nearly every other state, and in England.

The present action of mandamus is not only the old common-law proceeding of mandamus, but it is also the old common-law action on the case for the false return. It is the two proceedings combined. The alternative writ is now not merely a writ, as formerly, but it is also a pleading. The return is not now merely a response to the writ, as formerly (which return could not formerly be traversed or denied), but it is also a pleading; and the facts therein stated may now be controverted the same as they may on any other pleading. Issues are now made up by the writ and the return. A trial may be had on such

<sup>3</sup> See *Bagg's Case*, 11 Coke, 93b, 99 (1615): "If \* \* \* they certify a sufficient cause to remove him, but it is false, then the court cannot award a writ to restore him, neither can any issue be taken thereupon, because the parties are strangers, and have no day in court."

<sup>4</sup> This statute applied only to mandamus proceedings for determining the rights of offices and franchises in corporations and boroughs, at that time the most common application of mandamus. It was extended to all other cases by *St. 1 Wm. IV*, c. 21.

issues, and judgment rendered for the plaintiff, or for the defendant, the same as in any other civil action; and the action is now considered almost as much an action of right as any other civil action. But little now rests in the discretion of the court. *Napier v. Poe*, 12 Geo. 170, 178; *Harrington v. Berkshire Co.*, 22 Pick. (Mass.) 263, 268, 33 Am. Dec. 741. In fact, the proceeding by mandamus is now under existing statutes nearly everywhere in England and America considered as a civil action by and between the real parties thereto—the relator and the respondent (*Kendall v. Stokes*, 3 How. 100, 11 L. Ed. 506; *Arberry v. Beaver*, 6 Tex. 457, 464, 55 Am. Dec. 791; *State ex rel. Wells v. Marston*, 6 Kan. 524, 532), who are denominated the plaintiff and the defendant. See the reports of nearly all the states.

In the most of the states the action is now entitled by making the relator the plaintiff, and the respondent the defendant, and the action is prosecuted in the name of the relator as plaintiff, and not in the name of the state, as formerly, if the reports of adjudicated cases are correct. The states of Illinois, Michigan, New York, South Carolina, Wisconsin, and possibly a few other states, constitute an exception to the general practice of the present day. Our statutes everywhere seem to recognize the present proceeding by mandamus as a civil action, with the relator as the plaintiff, and the respondent as the defendant. \* \* \*<sup>5</sup>

<sup>5</sup> Accord: *People ex rel. Livingston v. Pacheco*, 29 Cal. 210 (1865).

See *State ex rel. Green Bay & M. R. R. Co. v. Jennings*, 56 Wis. 113, 119, 14 N. W. 28 (1882): "It is true that at common law the words 'civil action' would not include writs of mandamus. *Commonwealth v. Commissioners of Lancaster*, 6 Bin. (Pa.) 9; also *Chinn v. Trustees*, 32 Ohio St. 236, 237. Mr. Bouvier says: 'The vital idea of an action is a proceeding on the part of one person, as actor, against another, for the infringement of some right of the first, before a court of justice, in the manner prescribed by the court or the law.' On the other hand, a mandamus, at the common law of England, was denominated a prerogative writ, and was originally issued out of the Court of Chancery, but subsequently out of the Court of King's Bench, because the king originally sat in those courts in person, and aided in the administration of justice. Hence, in theory at least, it was not so much the individual seeking redress as the king who was the actor. In this country it cannot be a prerogative writ; but, nevertheless, partakes of the nature of such a writ, and under the Constitution and laws is issued by the courts. *Attorney General v. Railroad Companies*, 35 Wis. 512 et seq. Beyond question it is, however, in a proper case, in substance a civil remedy for the citizen who has been deprived of a clear legal right, notwithstanding it is commenced and prosecuted in the name of the state. The state is only a nominal party. *Brower v. O'Brien*, 2 Ind. 431; *State v. Commissioners*, 5 Ohio St. 502. The word 'suit' is frequently used in practice as synonymous with the words 'civil action,' but, nevertheless, it seems to be more comprehensive, and includes proceedings in chancery as well as law. \* \* \* So it has been held to include proceedings by mandamus. *McBane v. People*, 50 Ill. 506, 507; *Felts v. Mayor*, 2 Head (Tenn.) 650. \* \* \*

See *Brown v. Crego*, 29 Iowa, 321 (1870).

## STATE ex rel. COTHREN v. LEAN.

Supreme Court of Wisconsin, 1859. 9 Wis. 279.

PAINE, J. This was an application for a writ of mandamus, to compel Joseph Lean, the register of deeds of Iowa county, to keep his office at Mineral Point. An alternative writ was issued at the last term, and on the return day counsel appeared on behalf of Lean, and moved to quash the writ, for alleged defects in the petition on which it was granted. This motion was argued in the absence of the relator, but was not disposed of, and owing to the changes of the judges composing this court a reargument was ordered.

At the present term the relator has filed a motion to strike from the files the motion to quash, and also another motion for a peremptory writ. These three motions were argued together, and will now be disposed of.

In support of the motion to strike off, it was urged that, after an alternative writ of mandamus is once issued, the person to whom it is directed can only make return according to its mandate, and cannot be permitted to move to quash the writ, even for alleged defects in substance in the petition on which it was issued. But we are satisfied that as a matter of practice, in such cases, a motion to quash is entirely proper. Alternative writs are usually granted without much examination. The papers are read, and, if it appears clearly that the petitioner is not entitled to the relief sought, the writ is refused. Otherwise it has been usual to allow it to issue, leaving the merits of the application to be determined when presented by those familiar with them, and when both sides should be represented. And this course is almost a necessity.

Applications for the writ are ex parte. The questions involved are frequently complicated, and the solutions difficult. And it would be impossible for the court to give them such examination that the issuing of the writ should be held at all conclusive on the sufficiency of the application. And a motion to quash is a proper mode of testing that sufficiency. It performs the functions of a demurrer to a declaration, and we think, if a writ should be issued on an application defective in substance, the person to whom it was directed should have some method of raising that question before being compelled to answer. And the authorities cited by the counsel for the respondent show that a motion to quash has been resorted to for that purpose, both in this country and in England. We think the practice proper, and the motion to strike off must therefore be denied.<sup>6</sup> \* \* \*

The motion to quash the alternative writ is therefore denied. But as we have held the filing of such a motion to be proper practice, to test the sufficiency of the application, we think, when the motion is overruled, the respondent should have further time to answer if

<sup>6</sup> See Corpus Juris, "Mandamus," p. 896.



he desires it. If further time is desired, the respondent may answer within twenty days, and the peremptory writ is denied. If no further time to answer is desired the peremptory writ may issue.

PAINE, J. Since the former decision on the several motions then pending, the respondent has filed a return, to which the relator has demurred. On the argument the question was raised whether or not the allegations in the petition, on which the writ was issued, which are not denied by the return, are to be considered as true. The respondent's counsel contended that they were not, and that the return is the primary pleading in the case, and that on a demurrer to that nothing was to be taken as true except the allegations of the return itself.

But we do not think this view correct. On the contrary, we are satisfied, both from the reason of the thing and from the authorities on the subject, that the affidavit or petition on which the alternative writ issues, the allegations of which are incorporated into the writ itself, performs the office of a declaration. It sets forth the grounds relied on by the prosecutor, as entitling him to the peremptory writ, and it is incumbent on the respondent, by his return, to sufficiently answer those allegations, and negative the prosecutor's right. The function of the return is not simply to show what would amount to a prima facie right in the respondent, in the absence of any allegation to the contrary; but it is to show a right to refuse obedience to the writ, in view of the allegations it contains. And if it does not do this, it is demurrable. And the very object of a demurrer to the return is to test its sufficiency as an answer to the allegations of the writ; and it is obvious that this can only be done by assuming all the material allegations of the writ not denied, nor confessed and avoided, to be true.

The plea or answer which the plaintiff may put into the return is designed to enable him to traverse or confess and avoid it, when it, in the first instance, sufficiently answers the writ; and not to repeat material allegations previously made, which had been left entirely unanswered, in order to obtain the benefit of them.

We think, therefore, that the demurrer to the return raises the question of its sufficiency, and of the sufficiency of the relation, and that in disposing of it, not only the return, but every material allegation in the relation not denied nor confessed and avoided, is to be taken as true. \* \* \* 7

7 See Corpus Juris, "Mandamus," p. 888.

## PEOPLE ex rel. GAS LIGHT CO. v. COMMON COUNCIL OF SYRACUSE.

Court of Appeals of New York, 1879. 78 N. Y. 56.

CHURCH, C. J. This is an appeal from a judgment denying a mandamus to compel the common council of the city of Syracuse to proceed to the assessment and collection of a tax sufficient to pay the relator and another property owner the appraised value of lands proposed to be taken for street purposes. The commissioners appointed to appraise the value of the lands filed their report December 11, 1871, and on October 13, 1873, the common council passed a resolution rescinding the original resolution to widen the street and condemn lands therefor, and declared that all proceedings taken pursuant thereto were abandoned and discontinued. The application for a mandamus was made June 29, 1875.

The two material questions presented are: First. Whether the common council had the legal right as against the property owners to discontinue the proceedings. Second. If this should be determined in the negative, whether the lapse of time and other circumstances justified the judgment refusing a mandamus. [The discussion of the first question is omitted. The court concluded that the rescinding resolution was void.]

As to the question whether the court below was justified in refusing a mandamus on account of the lapse of time which intervened, there is more embarrassment. The writ of mandamus is called a prerogative writ. It originated from a necessity to furnish a remedy to compel the performance of a specific duty, in cases where the ordinary forms of legal procedure furnished no adequate remedy, and issued by the exercise of the sovereign power of the king, who originally sat in the King's Bench in person. 1 Bl. Com. 239. As this exercise of power could not be controlled, the issuing of the writ was necessarily discretionary, and [it] was liable to be issued or refused as the king might see fit.

When the power became vested in the courts of England, and when transmitted to our own courts, it has been and is still regarded as discretionary, as distinguished from a writ of right. But although in this sense discretionary in the court to grant or refuse this remedy, yet it is not an absolute and arbitrary discretion, but the power is to be exercised, and may be regulated and controlled by certain rules of law dictated by experience, and incorporated into our system of judicature. *Fish v. Weatherwax*, 2 Johns. Cas. 215, note, and cases cited. The distinction between an absolute discretion, and that which is governed by legal rules, is well recognized. The former is not reviewable; the latter is. *Howell v. Mills*, 53 N. Y. 322. This case belongs to the latter class. There must be a clear legal right. We have seen that such right existed. There must be no other adequate remedy. It is not disputed that such was the fact.

It is insisted that the relator has lost his right by delay. Some delay was necessary. The commissioners were to be put in motion, local assessments, and perhaps general assessments, were to be made, perfected, and collected, and this would occupy an indefinite period of time. How long does not appear. The case seems to have been tried upon the pleadings, and it was alleged that the relator had often requested the common council to make the assessment. It nowhere appears what answer was made to these applications, whether the council refused, or promised performance, so that up to the period of the resolution of abandonment there is nothing in the case to show a want of vigilance on the part of the relator or any indisposition on the part of the common council to perform their duty. But after that it is argued that from the lapse of time before applying for the writ, about twenty months, it may be inferred that the relator acquiesced in the abandonment, and it is laid down as a rule that a party must not sleep upon his rights. There would be some force in this position if it appeared that the relator knew of this action of the common council; but this fact is neither alleged, nor proved. I have been unable to find any authority for the position (that a mere delay of this character has been fatal to the right of a party to this remedy, when a clear legal and substantial right has been shown.) \* \* \*

When the relator has for an unreasonable time slept upon his rights, the court may in the exercise of a sound discretion refuse the writ. In determining what will constitute such unreasonable delay, regard should be had to circumstances which justify the delay, to the nature of the case and the relief demanded, and to the question whether the rights of the defendant or of other persons have been prejudiced by such delay. *Chinn v. Trustees*, 32 Ohio St. 236. The difficulty with the case on the part of the defendant is that no facts were shown which would justify a refusal of the writ, except a delay which may in part at least have been caused by the defendant. There is nothing to show but that the plaintiff supposed that the proceedings were progressing, or that he thought an abandonment was contemplated, nor any change of circumstances shown, rendering the consummation of the improvement impracticable or specially injurious to the defendant or individuals. That question seems not to have been litigated on the trial. The circumstances should be shown which according to established rules justify a refusal of the writ.

In *King v. Canal Co.*, 1 M. & C. 35, there was delay, and another remedy. In *King v. Commissioners*, 20 Eng. Com. Law, 525, there was delay, and the issuing of the writ would have been prejudicial to the intervening private rights of others, and in all the cases circumstances appeared which according to settled rules of public policy warranted a refusal of the writ. 2 Crary's Prac. 51, 52, and cases cited; 5 Wait's Prac. 552.

(When the relator shows a fixed legal right to compensation for lands condemned for public purposes, a mere delay of the character



appearing in this case is not sufficient to deprive him of the right. *People v. Board of Supervisors*, 12 Barb. 446. The nature of the case is such that circumstances may exist rendering it improper to grant the writ, but no such facts appeared. A new trial may develop them.

We do not deem it necessary to notice the other points. \* \* \*

As the case appeared, we think it was error to refuse the writ.

The judgment must be reversed, and a new trial granted, costs to abide event. All concur, except ANDREWS, J., absent.

Judgment reversed.<sup>8</sup>

PEOPLE *ex rel.* AMERICAN CENT. RY. v. SUPERVISOR AND  
TOWN CLERK OF OHIO GROVE TP., MER-  
CER COUNTY.

Supreme Court of Illinois, 1869. 51 Ill. 191.

WALKER, J. \* \* \* The demurrer questions the sufficiency of the return as a defense to the prayer of the information. The alternative writ stands for a declaration, and the return as a plea. Like other pleas, it must state facts positively and distinctly. The return should set out the facts fully, so as to enable the relator to traverse them. It is not sufficient to aver conclusions of law. If facts are not stated, or if insufficiently stated, the plea will be held bad. Greater certainty is required in a return than in an ordinary plea in bar. *Tapping on Mandamus*, 352, 370; *Moses on Mandamus*, 210. In the case of *People v. Kilduff*, 15 Ill. 492, 60 Am. Dec. 769, it was held that every intendment would be made against returns which do not answer important facts.

The return does not deny, and we must hold it to be true, that an election was held, judges and clerks appointed, and the majority of the votes cast were in favor of subscription. It does not deny that the proper requisition for an election was made, or that notices were given ten days before the election. It, however, avers that the election was not called, held and conducted according to the requirements of the act of 1859, in this: That there were no legal notices posted for the election ten days previous thereto, as required by the act, nor were judges and clerks legally appointed to hold the election. There is no effort to specify in what the notices lacked to conform to the legal requirement, or in what the appointment of such officers violated the law or failed to conform to its requirements. From what is averred in reference to these acts, the facts are not stated so that the court can determine whether they are sufficient. In this the pleader has only averred his conclusion as to the illegality of the acts thus set up and relied upon to prevent the peremptory writ from issuing.

<sup>8</sup> See, also, *People ex rel. Stettauer v. Olsen*, 215 Ill. 620, 74 N. E. 785 (1905).

The return should have specified the particular facts which rendered the notices illegal and the acts omitted in appointing the judges and clerks. \* \* \* 9

### PIKE COUNTY COM'RS v. PEOPLE ex rel. METZ.

Supreme Court of Illinois, 1849. 11 Ill. 202.

This was a proceeding by mandamus in the Pike county circuit court, instituted by the relator against the county commissioners of that county, to compel the payment to him of the sum of \$125, and interest, which had been originally appropriated by the Legislature to the county, and by a subsequent law set apart for the improvement of the navigation of McKee's creek, in said county, to be expended by the relator.

TREAT, C. J. It is contended that the relator has not such an interest in the fund sought to be recovered as will authorize him to prosecute this peculiar remedy. (The question, who shall be the relator, in an application for a mandamus, depends upon the object to be attained by the writ.) Where the remedy is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced must become the relator. He is considered as the real party, and his right to the relief demanded must clearly appear. A stranger is not permitted officiously to interfere, and sue out a mandamus in a matter of private concern. But where the object is the enforcement of a public right, the people are regarded as the real party, and the relator need not show that he has a legal interest. It is sufficient that he is interested, as a citizen, in having the laws executed, and the right in question enforced. See the case of *People v. Collins*, 19 Wend. (N. Y.) 56, where this question is much discussed, and the foregoing conclusions are clearly stated. No doubt is entertained of the right of Metz to become the relator, and pursue this remedy. The object of the suit is not a matter of individual interest, but of public concern. Any citizen of the county, especially of the locality

<sup>9</sup> "There is no form of pleading known to the law in which greater certainty is required than in a return to a writ of mandamus. It requires, not only the greatest possible certainty—not merely certainty to a common intent, or certainty to a certain intent in general—but certainty to the greatest possible intent; or, as it is sometimes called, certainty to a certain intent in every particular. *King v. Mayor*, 1 Ld. Raym. 559 (1701) Bac. Abr. 'Mandamus,' 1 K.; *Rex v. Liverpool*, 2 Burrows, 731 (1759); *Tapp. Mand.* 393; *Harwood v. Marshall*, 10 Md. 452 (1857); *Reichenbach v. Ruddach*, 121 Pa. 18, 15 A. 488 (1888); *Com. v. Commissioners*, 37 Pa. 277 (1860); *Rex v. Malden*, 2 Salk. 431 (1700). The reason for this strictness is that at the common law the return could not be traversed. However that may be now in some cases, the rule is practically the same in the present instance. We all agree that we are bound by the return to the writ, and that if it discloses a sufficient ground to refuse the license we can go no further. It follows that the common-law rule as to the certainty of the return must be applied." *In re Prospect Brewing Co.*, 127 Pa. 523, 17 A. 1090 (1889).

interested in having the improvement prosecuted, could become the relator, and obtain the mandamus. There is a manifest propriety in permitting Metz to give the information, and conduct the proceeding. He has the direction of the improvement, and the money, when received, is to pass into his hands, and be disbursed by him. \* \* \*

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PEOPLE ex rel. DRAKE v. REGENTS OF UNIVERSITY OF MICHIGAN.

Supreme Court of Michigan, 1856. 4 Mich. 93.

This was an application by the relator, who was a private citizen of this state, for an alternative mandamus against the Regents of the University of Michigan, founded upon his affidavit, which set forth that he was a citizen of this state, that there was, at the time of filing his affidavit, no Professor of Homœopathy in the Department of Medicine of the University, that the Regents, whose duty it was, had not only neglected and refused (although often requested thereto) to elect such Professor, but still neglected and refused so to do.

The law, upon which the application was founded (Sess. Laws 1856, p. 234), provides: "That the Regents shall have power to enact ordinances, by-laws, and regulations for the government of the University, to elect a President, to fix, increase and reduce the regular number of Professors and tutors, and to appoint the same, and to determine the amount of their salaries: Provided, there shall always be, at least, one Professor of Homœopathy in the Department of Medicine."

WING, J. The first objection is predicated upon the alleged incapacity of an individual citizen, who is only interested in common with all other citizens of the state in the subject-matter of complaint, to institute a proceeding of this kind against a public corporation, sustaining the relations which the University of Michigan does to this state.

It is alleged that, where there is a cause of complaint against a public body or corporation, it is the duty of the Attorney General of the state to move against them, and that it would be peculiarly fit, in a matter of complaint of so grave a character as that presented by the affidavit of the relator, that it should be presented by, or be under the control and sanction of, that officer, whose duty it is to act in all such cases. To this it is answered by the counsel of the relator, in substance, that though true it is the matter in question is one, that interests the citizens generally, yet the right of every citizen of the state to move in the proper courts in a matter in which the citizens at large are concerned, and in respect to which there is ground of complaint against a public body or officers of this state



that they have neglected the performance of some duty imposed upon them by law, is fully sustained both by principle and authority.

Upon examination of the authorities cited by the counsel of the respective parties, we find no case decided by the English courts which sanctions this action of their courts on an application of this character, upon the sole motion of a private citizen of the realm. From this it is, we think, to be inferred that the practice was never sanctioned by their courts.

On looking into the American authorities cited, we find that the Supreme Court of New York have taken the broad ground in the case of *People v. Collins*, 19 Wend. 64, and in *People v. Tracy*, 1 Denio, 618, that in all cases requiring redress, and involving a matter in which the interests of the public at large are concerned, and in respect to which a mandamus is the proper remedy, it is competent for their courts to act upon the relation and motion of a private citizen of the state. The doctrine of those cases was approved and followed by the Supreme Court of Illinois in the case of *County of Pike v. State*, 11 Ill. 202. These are the only cases to which we have been cited, or which have fallen under our observation, which sanction the right claimed by the relator in this case.

To these authorities, as we have said, is opposed the fact that the English courts, which have moulded and formed the common law, transmitted it to us, and which govern both them and us, have not sustained a course of proceeding like this. The courts of Maine, Massachusetts and Pennsylvania have maintained a doctrine on this subject opposed to the New York and Illinois cases, and have held that, to entitle an individual citizen to be heard as a relator and on his own motion, he must show that he has some individual interest in the subject-matter of complaint which is not common to all the citizens of the state; and whilst we do not intend to say that a case may not arise in which this court would allow an individual to file such a complaint, particularly if the Attorney General or prosecuting attorney (as the case may be) were absent, or refused to act without good cause, we nevertheless express our conviction that this is a case in which the action of the Attorney General would have been proper and necessary. \* \* \* 10

<sup>10</sup> See an article by F. J. Goodnow on "Interest in Mandamus Cases," *Political Science Quarterly*, VIII, p. 48.

## COMMISSIONERS v. SELLEW.

Supreme Court of the United States, 1878. 99 U. S. 624, 25 L. Ed. 333.

WAITE, C. J. \* \* \* In *United States v. Boutwell*, 17 Wall. 604, 21 L. Ed. 721, it was decided that, as a mandamus was used "to compel the performance of a duty resting upon the person to whom the writ is sent," if directed to a public officer, it abated on his death or his retirement from office, because it could not reach the office. That principle does not, as we think, apply to this case. There the officer proceeded against was the Secretary of the Treasury of the United States, and the writ was "aimed exclusively against him as a person." Here the writ is sent against the board of county commissioners, a corporation created and organized for the express purpose of performing the duty, among others, which the relator seeks to have enforced. The alternative writ was directed both to the board in its corporate capacity and to the individual members by name, but the peremptory writ was ordered against the corporation alone. As the corporation can only act through its agents, the courts will operate upon the agents through the corporation. When a copy of the writ which has been ordered is served upon the clerk of the board, it will be served on the corporation, and be equivalent to a command that the persons who may be members of the board shall do what is required. If the members fail to obey, those guilty of disobedience may, if necessary, be punished for the contempt. Although the command is in form to the board, it may be enforced against those through whom alone it can be obeyed. One of the objects in creating such corporations, capable of suing and being sued, and having perpetual succession, is that the very inconvenience which manifested itself in *Boutwell's Case* may be avoided. In this way the office can be reached and the officer compelled to perform its duties, no matter what changes are made in the agents by whom the officer acts. The board is in effect the officer, and the members of the board are but the agents who perform its duties. While the board is proceeded against in its corporate capacity, the individual members are punished in their natural capacities for failure to do what the law requires of them as the representatives of the corporation.

We think, therefore, that the peremptory writ was properly directed to the board in its corporate capacity. In this way the power of the writ is retained until the thing is done which is commanded, and it may at all times be enforced, through those who are for the time being charged with the obligation of acting for the corporation. If in the course of the proceedings it appears that a part of the members have done all they could to obey the writ, the court will take care that only those who are actually guilty of disobedience are made to suffer for the wrong that is done. Those who are members of the board at the time when the board is required to act will be

the parties to whom the court will look for the performance of what is demanded. As the corporation cannot die or retire from the office it holds, the writ cannot abate as it did in *Boutwell's Case*. The decisions in the state courts in which this practice is sustained are numerous. *Maddox v. Graham*, 2 Metc. (Ky.) 56; *State ex rel. Soutter v. City of Madison*, 15 Wis. 30; *Pegram v. Commissioners of Cleaveland County*, 65 N. C. 114; *People v. Collins*, 19 Wend. (N. Y.) 56. \* \* \*<sup>11</sup>

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## SECTION 36.—REFUSAL TO OBEY MANDAMUS

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### AMY v. SUPERVISORS.

Supreme Court of the United States, 1870. 11 Wall. 136, 20 L. Ed. 101.

Amy having obtained a judgment for money against Des Moines County, Iowa, in the Circuit Court for the District of Iowa, and not being paid, procured from the same court a mandamus against Burkholder and several others, the supervisors of the county, to compel the levy of a tax. The mandamus not being obeyed, he sued them personally. They set up certain defenses, to which he demurred. The court overruled the demurrer, and he brought the case here.

SWAYNE, J. \* \* \* The rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender. The question of the rule by which the measure of damages is to be ascertained is not before us, and we do not feel called upon to express any opinion upon the subject.

The defenses set up in the answer of the defendants are clearly bad. The demurrer should have been sustained. \* \* \*<sup>12</sup>

<sup>11</sup> See, also, *City of Ottawa v. People*, 48 Ill. 233 (1868).

<sup>12</sup> Disobedience to the writ of mandamus constitutes contempt of court, and is punishable by fine and imprisonment. *Corpus Juris* "Mandamus," p. 933.



## SECTION 37.—PROVINCE OF THE WRIT OF MANDAMUS

## HASSEL'S CASE.

Court of King's Bench, 1719. 1 Str. 211.

Fazakerley moved for a mandamus to be directed to the justices of peace of the county of Chester, commanding them to make a rate to reimburse one Hassel the money he had expended as surveyor of the highways. And it was granted.

## JOHN GILES' CASE.

Court of King's Bench, 1731. 2 Str. 881.

Mr. Reeve moved for a mandamus to the justices of the city of Worcester, to grant a license to Giles to keep an alehouse, insisting that, it being within a city, St. Geo. II, c. 28, did not extend to it.

Strange, contra, insisted that it was discretionary in the justices, and cited *Stephens v. Watson*, 1 Salk. 45, that no appeal lies from the denial of a license,<sup>13</sup> and if the owner be committed, the want of a license can only come in question, and not the reason why it was denied.

Et PER CURIAM. There never was an instance of such a mandamus, and therefore we will not grant it.

## KING v. BISHOP OF LITCHFIELD.

Court of King's Bench, 1734. 7 Mod. 217.

Mandamus to Bishop to license a person elected usher to a grammar school.

Lord HARDWICKE, Chief Justice. \* \* \* If the bishop here acts judicially, a mandamus lies not to compel him to grant a license, but only to determine the one way or the other; as we often grant them to give sentence, generally, without directing them what sentence to give, so to give judgment in inferior courts; but if he acts ministerially, and it appears to us that the person applying for a mandamus

<sup>13</sup> "It was said by Mr. Nares in the case of *Rex v. Young and Pitts, Esq.*, B. R., 20th April, 1758, that the sole reason why the justices of the peace refused the license in this case was because Giles had signed a petition to erect a workhouse, and though the refusal was so ill founded, yet the mandamus was denied. MSS. See, also, the report of that case. 1 Burr, 556. (Note by Reporter.)

*If acts judicially  
no mandamus  
to compel  
granting  
a license*

*A mandamus  
lies if acts  
ministerially  
to require  
admission*

is qualified for the office he prays to be admitted to, then a mandamus goes requiring his admission. I should doubt whether he acts in a judicial capacity in this place. \* \* \*<sup>14</sup>

### KENDALL v. UNITED STATES ex rel. STOKES.

Supreme Court of United States, 1838. 12 Pet. 524, 9 L. Ed. 1181.

Error to the Circuit Court of the District of Columbia.

The Circuit Court had ordered a peremptory mandamus, to be directed against the Postmaster General, to be issued. The Postmaster General prosecuted this writ of error.

THOMPSON, Justice, delivered the opinion of the court.

This case comes up on a writ of error from the Circuit Court of the United States for the District of Columbia, sitting for the county of Washington. This case was brought before the court below by petition setting out certain contracts made between the relators and the late Postmaster General, upon which they claimed certain credits and allowances upon their contracts for the transportation of the mail; that credits and allowances were duly made by the late Postmaster General; that the present Postmaster General, when he came into office, re-examined the contracts entered into with his predecessor, and the allowances made by him, and the credits and payments which had been made, and directed that the allowances and credits should be withdrawn, and the relators recharged with divers payments they had received; that the relators presented a memorial to Congress on the subject, upon which a law was passed on the 21st of July, 1836, for their relief, by which the Solicitor of the Treasury was authorized and directed to settle and adjust the claims of the relators for extra services performed by them, to inquire into and determine the equity of such claims, and to make the relators such allowances therefor as, upon full examination of all the evidence, may seem right, according to the principles of equity; and that the Postmaster General be and he is hereby directed to credit the relators with whatever sum or sums of money, if any, the Solicitor shall so decide to be due to them, for and on account of any such service or contract. And the petition

<sup>14</sup> See *Rex v. Askew*, 4 Burr. 2189 (1768); *Rex v. Archbishop of Canterbury*, 15 East, 142 (1812).

"The petitioner as an applicant for admission to practise was, therefore, entitled to demand from the board the right to be heard on the charges against him upon which the board has denied him admission. But he made no demand of this kind. Instead of doing so, he filed this petition in mandamus in which he asked for a writ to compel the board summarily to enroll him in the list of practitioners, and to enjoin it from interfering with his representing clients before it. He was not entitled to this on his petition. Until he had sought a hearing from the board, and been denied it, he could not appeal to the courts for any remedy, and certainly not for mandamus to compel enrollment." *Goldsmith v. U. S. Board of Tax Appeals*, 270 U. S. 117, 123, 46 S. Ct. 215, 217 (70 L. Ed. 494) (1926).

further sets out that the Solicitor, Virgil Maxey, assumed upon himself the performance of the duty and authority created and conferred upon him by the law, and did make out and communicate his decision and award to the Postmaster General, by which award and decision the relators were allowed \$161,563.89; that the Postmaster General, on being notified of the award, only so far obeyed and carried into execution the act of Congress as to direct, and cause to be carried to the credit of the relators, the sum of \$122,102.46; but that he has and still does refuse and neglect to credit the relators with the residue of the sum so awarded by the solicitor, amounting to \$39,462.43. And the petition prayed the court to award a mandamus, directed to the Postmaster General, commanding him fully to comply with, obey and execute the said act of Congress, by crediting the relators with the full and entire sum awarded in their favor by the Solicitor of the Treasury. Such proceedings were afterwards had in the case that a peremptory mandamus was ordered, commanding the said Amos Kendall, Postmaster General, forthwith to credit the relators with the full amount awarded and decided by the Solicitor of the Treasury to be due to the relators.

The questions arising upon this case may be considered under two general inquiries: (1) Does the record present a proper case for a mandamus? And if so, then (2) had the Circuit Court of this District jurisdiction of the case, and authority to issue the writ?

Under the first head of inquiry, it has been considered by the counsel on the part of the Postmaster General that this is a proceeding against him to enforce the performance of an official duty. And the proceeding has been treated as an infringement upon the executive department of the government, which has led to a very extended range of argument on the independence and duties of that department, but which, according to the view taken by the court of the case, is entirely misapplied. We do not think the proceedings in this case interfere, in any respect whatever, with the rights or duties of the executive; or that it involves any conflict of powers between the executive and judicial departments of the government. The mandamus does not seek to direct or control the Postmaster General in the discharge of any official duty, partaking in any respect of an executive character, but to enforce the performance of a mere ministerial act, which neither he nor the President had any authority to deny or control.

We shall not, therefore, enter into any particular examination of the line to be drawn between the powers of the executive and judicial departments of the government. The theory of the Constitution undoubtedly is that the great powers of the government are divided into separate departments; and so far as these powers are derived from the Constitution, the departments may be regarded as independent of each other. But, beyond that, all are subject to regulations by law touching the discharge of the duties required to be performed.



The executive power is vested in a President; and so far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power. But it by no means follows that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not and certainly cannot be claimed by the President. There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character. \* \* \*

Under this law, the Postmaster General is vested with no discretion or control over the decisions of the Solicitor; nor is any appeal or review of that decision provided for by the act. The terms of the submission was a matter resting entirely in the discretion of Congress; and if they thought proper to vest such a power in any one, and especially as the arbitrator was an officer of the government, it did not rest with the Postmaster General to control Congress, or the Solicitor, in that affair. \* \* \*

It was urged at the bar that the Postmaster General was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law; and this right of the President is claimed as growing out of the obligation imposed upon him by the Constitution to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the Constitution, and is asserting a principle which, if carried out in its results to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice.<sup>15</sup>

To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution is a novel construction of the Constitution, and entirely inadmissible. But although the argument necessarily leads to such a result, we do not perceive from the case that any such power has been claimed by

<sup>15</sup> See *Bayard v. United States ex rel. White*, 127 U. S. 246, 8 S. Ct. 1223, 32 L. Ed. 116 (1888): "We express no opinion as to the validity of the second ground of defense set up in the answer, that the Secretary of State is not invested with authority over the moneys in question independently of the President, and that it is the opinion of the President that the public interests forbid the making of payments to White, in the condition of things set forth in the answer."

the President. But, on the contrary, it is fairly to be inferred that such power was disclaimed. He did not forbid or advise the Postmaster General to abstain from executing the law, and giving the credit thereby required, but submitted the matter in a message to Congress. \* \* \*

The right of the relators to the benefit of the award ought now to be considered as irreversibly established; and the question is, whether they have any, and what, remedy? The act required by the law to be done by the Postmaster General is simply to credit the relators with the full amount of the award of the Solicitor. This is a precise, definite act, purely ministerial, and about which the Postmaster General had no discretion whatever. The law, upon its face, shows the existence of accounts between the relators and the Post Office Department. No money was required to be paid, and none could have been drawn out of the treasury, without further legislative provision, if this credit should overbalance the debit standing against the relators. But this was a matter with which the Postmaster General had no concern. He was not called upon to furnish the means of paying such balance, if any should be found; he was simply required to give the credit. This was not an official act in any other sense than being a transaction in the department where the books and accounts were kept, and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise. All that is shut out by the direct and positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act.

And in this view of the case, the question arises, is the remedy by mandamus the fit and appropriate remedy? The common law, as it was in force in Maryland, when the cession was made, remained in force in this District. We must, therefore, consider this writ as it was understood at the common law, with respect to its object and purpose, and varying only in the form required by the different character of our government. It is a writ, in England, issuing out of the King's Bench, in the name of the king, and is called a prerogative writ, but considered a writ of right;<sup>16</sup> and is directed to some person, corporation or inferior court, requiring them to do some particular thing, therein specified, which appertains to their office or duty, and which is supposed to be consonant to right and justice, and where there is no other adequate specific remedy. Such a writ, and for such a purpose, would seem to be peculiarly appropriate to the present case. The right claimed is just and established by positive law; and the duty required to be performed is clear and specific, and there is no other adequate remedy.

<sup>16</sup> See *People ex rel., etc., v. Common Council, etc.*, 78 N. Y. 56, 61 (1879), *supra*, p. 447.

The remedies suggested at the bar were, then, an application to Congress, removal of the Postmaster General from office, and an action against him for damages. The first has been tried and failed. The second might not afford any certain relief, for his successors might withhold the credit in the same manner; and, besides, such extraordinary measures are not the remedies spoken of in the law which will supersede the right of resorting to a mandamus; and it is seldom that a private action at law will afford an adequate remedy. If the denial of the right be considered as a continuing injury, to be redressed by a series of successive actions, as long as the right is denied, it would avail nothing, and never furnish a complete remedy. Or, if the whole amount of the award claimed should be considered the measure of damages, it might, and generally would, be an inadequate remedy, where the damages were large. The language of this court, in the case of *Osborn v. United States Bank*, 9 Wheat. 844, 6 L. Ed. 204, is that the remedy by action in such cases would have nothing real in it. It would be a remedy in name only, and not in substance, especially where the amount of damages is beyond the capacity of a party to pay.

That the proceeding on a mandamus is a case within the meaning of the act of Congress has been too often recognized in this court to require any particular notice. It is an action or suit brought in a court of justice, asserting a right, and is prosecuted according to the forms of judicial proceedings.<sup>17</sup>

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### DECATUR v. PAULDING.

Supreme Court of the United States, 1840. 14 Pet. 497, 10 L. Ed. 559.

TANEY, C. J., delivered the opinion of the court.

This case is brought here by a writ of error from the judgment of the Circuit Court of the United States for the District of Columbia, refusing to award a peremptory mandamus. The material facts in the case are as follows:

By an act of Congress, passed on the 3d of March, 1837, the widow of an officer who died in the naval service became entitled to receive out of the navy pension fund half the monthly pay to which the deceased officer would have been entitled under the acts regulating the pay of the navy in force on the 1st day of January, 1835; the half pay to commence from the time of the death of such officer, and upon the death or intermarriage of such widow, to go to the

<sup>17</sup> For latter part of opinion, see post, p. 630.

Stokes subsequently brought an action for damages against Kendall, but it was held that the refusal to credit the amount in question did not constitute an actionable wrong; also that the plaintiff could not resort both to mandamus and to an action for damages. *Kendall v. Stokes*, 3 How. 87, 11 L. Ed. 506 (1845).



child or children of the officer. On the same day, the following resolution was passed by Congress:

"No. 2. Resolution granting a pension to Susan Decatur, widow of the late Stephen Decatur.

"Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, that Mrs. Susan Decatur, widow of the late Commodore Stephen Decatur, be paid from the navy pension fund a pension, for five years, commencing from the 30th day of June, 1834, in conformity with the provisions of the act concerning naval pensions and the navy pension fund, passed the 30th of June, 1834, and that she be allowed, from said fund, the arrearages of the half pay of a post captain, from the death of Commodore Decatur, to the 30th of June, 1834, together with the pension hereby allowed her, and that the arrearage of said pension be vested in the Secretary of the Treasury, in trust for the use of the said Susan Decatur: Provided that the said pension shall cease on the death or marriage of the said Susan Decatur.

"Approved, March 3, 1837."

By the act of Congress of July 10, 1832, the Secretary of the Navy is constituted the trustee of the navy pension fund, and as such it is made his duty to grant and pay the pensions, according to the terms of the acts of Congress.

After the passage of the law and resolution of March 3, 1837, Mrs. Susan Decatur, the widow of Commodore Decatur, applied to Mahlon Dickerson, then Secretary of the Navy, to be allowed the half pay to which she was entitled under the general law above mentioned, and also the pension and arrearages of half pay specially provided for her by the resolution passed on the same day. The Secretary of the Navy, it appears, doubted whether she was entitled to both, and referred the matter to the Attorney General, who gave it as his opinion that Mrs. Decatur was not entitled to both, but that she might take under either, at her election. The Secretary thereupon informed her of the opinion of the Attorney General, offering at the same time to pay her under the law, or the resolution, as she might prefer. Mrs. Decatur elected to receive under the law; but it is admitted by the counsel on both sides that she did not acquiesce in this decision, but protested against it, and by consenting to receive the amount paid her she did not mean to waive any right she might have to the residue.

Some time afterwards Mr. Dickerson retired from the office of Secretary of the Navy, and was succeeded by Mr. Paulding, the defendant in this writ of error; and in the fall of 1838 Mrs. Decatur applied to him to revise the decision of his predecessor, and to allow her the pension provided by the resolution. The Secretary declined doing so, whereupon Mrs. Decatur applied to the circuit court for Washington county, in the District of Columbia, for a mandamus to compel him to pay the amount she supposed to be due to her. A

rule to show cause was granted by the court; and upon a return made by him, stating, among other things, the facts above mentioned, the court refused the application for a peremptory mandamus. It is this decision we are now called on to revise.

In the case of *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181, it was decided in this court that the circuit court for Washington county, in the District of Columbia, has the power to issue a mandamus to an officer of the federal government, commanding him to do a ministerial act. The first question, therefore, to be considered in this case, is whether the duty imposed upon the Secretary of the Navy, by the resolution in favor of Mrs. Decatur, was a mere ministerial act. The duty required by the resolution was to be performed by him, as the head of one of the executive departments of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is, from time to time, required to act. If he doubts, he has a right to call on the Attorney General to assist him with his counsel; and it would be difficult to imagine why a legal adviser was provided by law for the heads of departments, as well as for the President, unless their duties were regarded as executive, in which judgment and discretion was to be exercised.

If a suit should come before this court, which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the Secretaries nor revise his judgment in any case, where the law authorized him to exercise discretion or judgment. Nor can it, by mandamus, act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties.

The case before us illustrates these principles, and shows the difference between executive duties and ministerial acts. The claim of Mrs. Decatur having been acted upon by his predecessor in office, the Secretary was obliged to determine whether it was proper to revise that decision. If he had determined to revise it, he must have exercised his judgment upon the construction of the law and the resolution, and have made up his mind whether she was entitled un-

der one only, or under both. And if he determined that she was entitled under the resolution as well as the law, he must then have again exercised his judgment, in deciding whether the half pay allowed her was to be calculated by the pay proper, or the pay and emoluments of an officer of the commodore's rank. And after all this was done, he must have inquired into the condition of the navy pension fund, and the claims upon it, in order to ascertain whether there was money enough to pay all the demands upon it, and if not money enough, how it was to be apportioned among the parties entitled. A resolution of Congress, requiring the exercise of so much judgment and investigation, can, with no propriety, be said to command a mere ministerial act to be done by the Secretary.

The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them. Upon the very subject before us, the interposition of the courts might throw the pension fund and the whole subject of pensions into the greatest confusion and disorder. It is understood, from the Secretary's return to the mandamus, that in allowing the half pay it has always been calculated by the pay proper, and that the rations or emoluments to which the officer was entitled have never been brought into the calculation. Suppose the court had deemed the act required by the resolution in question a fit subject for a mandamus, and, in expounding it, had determined that the rations and emoluments of the officer were to be considered in calculating the half pay. We can readily imagine the confusion and disorder into which such a decision would throw the whole subject of pensions and half pay, which now forms so large a portion of the annual expenditure of the government, and is distributed among such a multitude of individuals.

The doctrines which this court now hold in relation to the executive department of the government are the same that were distinctly announced in the case of *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181. In opinion the court say [12 Pet. 610]: "We do not think the proceeding in this case interferes, in any respect whatever, with the rights or duties of the executive, or that it involves any conflict of powers between the executive and judicial departments of the government. The mandamus does not seek to direct or control the Postmaster General in the discharge of any official duty, partaking in any respect of an executive character, but to enforce the performance of a mere ministerial act, which neither he nor the President had any authority to deny or control." And [12 Pet. 614] the court still more strongly state the mere ministerial character of the act required to be done in that case, and distinguish it from official acts of the head of a department, where judgment and discretion are to be exercised. The court there say: "He was simply required to give the credit. This was not an official act in any other sense than



being a transaction in the department where the books and accounts were kept, and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise. All that is shut out by the direct or positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act."

We have referred to these passages in the opinion given by the court in the case of *Kendall v. United States*, in order to show more clearly the distinction taken between a mere ministerial act, required to be done by the head of an executive department, and a duty imposed upon him in his official character as the head of such department, in which judgment and discretion are to be exercised. There was in that case a difference of opinion in the court in relation to the power of the circuit court to issue the mandamus. But there was no difference of opinion respecting the act to be done. The court were unanimously of opinion that in its character the act was merely ministerial. In the case before us it is clearly otherwise. The resolution in favor of Mrs. Decatur imposed a duty on the Secretary of the Navy, which required the exercise of judgment and discretion; and in such a case, the circuit court had no right, by mandamus, to control his judgment, and guide him in the exercise of a discretion which the law had confided to him.

We are, therefore, of opinion that the circuit court were not authorized by law to issue the mandamus, and committed no error in refusing it. And as we have no jurisdiction over the acts of the Secretary in this respect, we forbear to express any opinion upon the construction of the resolution in question. The judgment of the circuit court, refusing to award a peremptory mandamus, must be affirmed.<sup>18</sup>

+ 18 "The construction of a statute is not a ministerial act; it is the exercise of judgment. If it is the duty of the defendant to admit or not to admit the plaintiff to do business in this state, according to the interpretation to be put on the insurance statutes, then the admitting or refusing to admit involves the exercise of discretion and judgment. \* \* \* It is not a purely ministerial act and a mandamus ought not to issue." *American Casualty Ins. Co. v. Fyler*, 60 Conn. 448, 462, 22 Atl. 494, 25 Am. St. Rep. 337 (1891).

+ "Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ [i. e., the writ of mandamus] is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on

## PEOPLE ex rel. BAILEY v. BOARD OF SUPERVISORS OF GREENE COUNTY.

Supreme Court of New York, 1851. 12 Barb. 217.

HARRIS, J. \* \* \* The board of canvassers illegally and unjustly omitted to count the votes of the Third election district of the town of Catskill. The relator had a legal right to have these votes counted. The board, therefore, omitted to do an act which they ought to have done. There has been an omission to perform an official duty. For this omission the relator ought to have a remedy; and if no other remedy exists, and the parties to whom the writ is directed can yet perform the duty, he is entitled to a mandamus. If, on the other hand, the defendants cannot now perform that duty, even though they have erred in omitting to count the votes in question, the relator must look for some other remedy. A mandamus, if granted, would be unavailing.

The county board of canvassers, except in certain specific cases, is composed of the supervisors of the several towns in the county. The alternative mandamus assumes that the defendants, being such supervisors, constitute the board. This is not necessarily the case; but I will consider the question upon the assumption that this is so. That board met on the Tuesday following the election, and organized according to law. It then proceeded, though illegally and improperly, as it is alleged, to estimate the votes of the county and to make the statements prescribed by statute. They also proceeded to determine who had been elected county officers. This determination, it may be assumed, was erroneous. But it was made, and a copy, with the statement upon which it was made, has been published. It has been filed, and has become matter of record. The board has dissolved. Were the same individuals again to convene, they would not again constitute the county board of canvassers. No statute authorizes such second assembling, or prescribes its mode of organization. If convened and organized, it would have no legal authority to review its former acts, or correct its errors. When the board deposited with the clerk the result of its canvass, and declared who were elected to office, and published that result and determination, all its powers were expended.

that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required." *Roberts, Treasurer, v. United States*, 176 U. S. 221, 231, 20 Sup. Ct. 376. 379. 44 L. Ed. 443 (1899).

See, also, *People ex rel. Gosling v. Potts*, 264 Ill. 522, 106 N. E. 524 (1914).

See, further, *Allbutt v. General Council*, 23 Q. B. D. 90 (1889), post, p. 705; *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354 (1888), post, p. 721; *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074 (1903), post, p. 719.

If it had erred, the errors must be corrected by some other tribunal. The law has withheld from it the power of reviewing its own determinations.

But suppose the supervisors to reassemble and assume the office of recanvassing the votes of the county. They have already determined that Lyman Tremain is elected to the office of county judge. If they should obey the mandamus, they might make a new statement and determination, showing that the relator is elected. The object of granting the writ of mandamus is, as we have seen, to provide an efficacious remedy to the relator, so as to prevent a failure of justice. Of what advantage would such a determination, made under such circumstances, be to the relator? The result would, undoubtedly, be, as now, that both parties would claim to have been elected county judge. Both would take the requisite oath of office, and assume its duties, and the controversy then, as now, would only be determined by an action in the nature of a quo warranto. Such a revision of the canvass, therefore, if practicable, would produce no beneficial result, even to the relator himself. Instead of being an efficacious remedy, the writ in its operation would be wholly abortive. When it can be foreseen that this must be the result, the writ should not be granted. *Lex non cogit ad inutilia*. "The court will refuse the writ," says Tapping, "if it be manifest that it must be vain and fruitless, or cannot have a beneficial effect." Tapping on Mandamus, 17. I am of opinion, therefore, that, assuming that the board of canvassers erred in rejecting the votes of the Third election district of the town of Catskill, it is now too late for the canvassers to correct that error. The matter has passed beyond their jurisdiction or control. If the defendants, moved by the command of this court, or otherwise, should undertake such correction, their action would be wholly ineffectual for the purposes for which the relator seeks to enforce it. Nothing short of a quo warranto action can determine his right to the office.

I will not say that a state of facts might not occur which would call upon the court to interfere by mandamus to control the action of a board of canvassers, but this can only be done while such board is in existence. And even then the nature of the duties to be discharged by it is such that it can rarely be either expedient or practicable thus to interfere.<sup>19</sup> But, when the board, having performed the office for which it was constituted, whether legally or not, has been dissolved, it is incapable of being reanimated. Any act it should attempt to perform, even though it be done in obedience to the mandate of this court, would be extraofficial and nugatory.

<sup>19</sup> In a proper case the action of a canvassing board will be controlled by mandamus: *People ex rel. Nichols v. Board of County Canvassers of Onondaga County*, 129 N. Y. 395, 29 N. E. 327, 14 L. R. A. 624 (1891); *People ex rel. Daley v. Rice*, 129 N. Y. 449, 29 N. E. 355, 14 L. R. A. 643 (1891); *People ex rel. Derby v. State Board of Canvassers*, 129 N. Y. 461, 29 N. E. 358 (1891); *Rosenthal v. State Board of Canvassers*, 50 Kan. 129, 32 Pac. 129, 19 L. R. A. 157 (1893).



Nor does the relator need this writ. He has another and a more efficacious remedy. I agree with him that it is not an answer to the application for a mandamus to show that some other remedy exists against some other party. It would not, of itself, be enough for the defendants to show that the relator can obtain relief by quo warranto against the person whom they have declared to be elected. This principle only prevails when such other remedy is attainable against the same party to whom it is sought to have the mandamus directed. I prefer to put the refusal to grant the writ upon the ground that it is inappropriate and ineffectual, and that, by withholding it, we do not leave the relator without an appropriate and effectual remedy.

The ancient and appropriate proceeding to try and determine the right and title to all offices, says a very learned judge, was under the writ of quo warranto; and where a legal question was involved, this was the only mode of determining it. By the Revised Statutes, this old remedy is not only preserved, but rendered more expeditious and manageable, and it is declared to be especially applicable "when any person shall usurp, intrude into, or unlawfully hold or exercise any public office." 2 Rev. St. 581, § 28. See, also, Code 1851, § 432. "Provision is made for the determination of issues of law and of fact. The right of trial by jury, so vital to the due decision of the latter, is expressly maintained and declared. This, then, is emphatically the constitutional mode of proceeding for the trial of the title to offices."<sup>20</sup> *People v. Stevens*, 5 Hill, 631, note "a," per Kent, Chief Judge.

The motion for a peremptory mandamus must therefore be denied.<sup>21</sup>

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PEOPLE *ex rel.* BARTLETT *et al.* v. DUNNE, Mayor.

Supreme Court of Illinois, 1906. 219 Ill. 346, 76 N. E. 570.

Motion by the People, on the relation of one Bartlett and others, for leave to file a petition for a writ of mandamus against Edward F. Dunne, Mayor of Chicago. Denied.

CARTWRIGHT, C. J. Yesterday the relators moved for leave to file a petition for mandamus, and presented the petition, with suggestions in support of it. At that time the corporation counsel of the city of Chicago stated to the court that he had prepared an argument against the motion, which was presented to the court, and since that time a reply to his argument has been presented by the relators. The application in this class of cases is *ex parte*, and nothing has been or will be considered except the petition of the relators, with the accompanying suggestions in support of the motion.

<sup>20</sup> In the case of a clerk, mandamus is proper, since quo warranto is unavailable. *People ex rel. Drake v. Sutton*, 88 Hun, 175, 34 N. Y. Supp. 487 (1895).

<sup>21</sup> See, also, *State, etc., v. Lewis*, 35 N. J. Law, 377 (1872).

The petition sets out that the defendant, Edward F. Dunne, is mayor of the city of Chicago; that previous to the election he declared that, if elected, he would not enforce the laws of the state and the ordinances of the city respecting the keeping open of tippling houses on the Sabbath day; and that since his election he has neglected and refused to enforce such laws and ordinances, and has declared his deliberate intention to violate his duty in that respect and not to enforce either of them or to punish violators of them. Attention is called to the statute which imposes upon the mayor the duty and obligation to see that the laws and ordinances are faithfully executed, and the obligation assumed by him as mayor to do so.

The prayer of the petition is that this court will issue the peremptory writ of mandamus to the defendant, enjoining and commanding him, without delay, and by the use, as far as may be necessary for the purpose, of every means, power, and authority in that behalf conferred upon the mayor of said city by the laws of this state or the ordinances of the city of Chicago, to proceed, and thenceforth persistently to continue, to enforce within said city the statute of this state prohibiting the keeping open upon the first day of the week, called Sunday, of tippling houses and other places where liquor is sold or given away, and to compel the general observance of the provisions of said law in said city on each and every Sunday thereafter by every person amenable thereto, and to prevent the violation thereof, and secure the prosecution of every person violating the said law in said city, and to punish all violations of said law by licensed dramshop keepers in said city by the revocation of their licenses, and generally and at all times to take care that said law is faithfully executed in said city.

The remedy by mandamus is one which is allowed to compel the performance of some duty owing to an individual or to the public. The duty must be specific in its nature, and of such character that the court can prescribe a definite act or series of acts which will constitute a performance of the duty, so that the respondent may know what he is obliged to do and may do the act required, and the court may know that the act has been performed and may enforce its performance. It is not necessary, in all cases, that the performance of the duty should consist of a single act. It may be a succession of acts, if the duty is specific and the acts are of such a nature that the court can supervise the performance of the duty and the execution of the mandate. For example, the court may require a railroad company to relay a portion of its track which has been taken up, and operate it; to operate its railway as a continuous line; to deliver freight to a certain elevator; to run a daily passenger train for the accommodation of passengers over its road, in place of a mixed stock and passenger train; or to stop all its passenger trains at a certain station. But the writ has never been made use of, and does not lie, in this state at least, for the purpose of enforcing the performance of

duties generally. It will not lie where the court would have to control and regulate a general course of official conduct and enforce the performance of official duties generally. In such a case the court could not prescribe the particular act to be performed and enforce its performance.

It is plain that in this case, where the court is asked to require the defendant to adopt a course of official action, although it is a course required by the statute and imposed upon him by the law, it would be necessary for the court to supervise generally his official conduct, and to determine in very numerous instances whether he had persistently, and to the extent of his power and the force in his hands, carried out the mandate of the court and performed his official duty. It is manifest that, where there are about 7,000 saloons in a city which are kept open on the Sabbath day in violation of law, as is alleged in this case, the court would not only have to enforce a general course of official conduct on the part of the mayor, but must also determine in numerous instances whether ground existed for the revocation of licenses, whether there had been violations of law, and to what extent he had endeavored to perform his duty with the force and facilities at his command for doing it. The writ will not lie for any such purpose.

For the court to assume the management of municipal affairs in the city of Chicago would be to depart from its proper sphere and assume governmental functions, which are outside of the jurisdiction of the courts and not within the remedy by writ of mandamus. Leave to file the petition is denied.

Motion denied.<sup>22</sup>

<sup>22</sup> A writ of mandamus was subsequently refused to enforce the law against one owner of two saloons. *People ex rel. Bartlett v. Busse*, 238 Ill. 593, 87 N. E. 840 (1909).

See, also, *State ex rel. Wear v. Francis*, 95 Mo. 44, 8 S. W. 1 (1888); *State ex rel. Hawes v. Brewer*, 39 Wash. 65, 80 Pac. 1001, 109 Am. St. Rep. 858 (1905).

As to mandamus against the Governor, see 3 *Michigan Law Review*, p. 631; 9 *Minnesota Law Review*, p. 21.

*Pasmore v. Oswaldthistle Urban Council*, [1898] A. C. 387 (House of Lords). The duty of a local authority under section 15 of the Public Health Act, 1875, to make such sewers as may be necessary for effectually draining their district, cannot be enforced by mandamus brought by a private person. The only remedy for the neglect of the duty is that given by section 259 of the act, a complaint to the Local Government Board.



## SECTION 38.—SAME—CONTROL OF FAIRNESS OF DISCRETION

UNITED STATES *ex rel.* ROOP *v.* DOUGLASS.

Supreme Court of District of Columbia, 1890. 19 D. C. 99.

JAMES, J. \* \* \* There is nothing alarming in the term discretionary power. It has a legal meaning, with safe limitations. The intendment of a law which grants it, whether expressly or by implication, is that the discretionary decision shall be the outcome of examination and consideration; in other words, that it shall constitute a discharge of official duty, and not a mere expression of personal will. An arbitrary disapproval of a license, for example, determined upon without an examination of relevant facts, and expressing nothing but the mood of the officer, would not be, in contemplation of law, an exercise of the power granted. It would constitute, on the contrary, a neglect and refusal to perform his official functions, and would expose him to the interference of this court by the writ of mandamus. To what effect, however, would be a distinct question.

If, then, the respondents had discretionary power, what averments must their return contain, in justification of their refusal to issue a license? We have said that the rule of certainty applies only to the pleading of those facts which constitute the tests or conditions of their power, and which show that it has been lawfully exercised. So is it necessary, then, to state with certainty anything more than the fact that they have made an examination in obedience to the implied requirement of the law, and the further fact that, upon such examination, they believe that a license should not be granted to the petitioners, either because they are not fit persons, or because a bar-room should not, as a matter of public interest, be licensed in conjunction with the Globe Theater? Is it necessary that they should also state with certainty, so as to establish them as facts, or state at all, the matters of fact on which they based their decision? \* \* \*

The special reasons for respondents' decision—that is to say, the alleged fact that robberies were committed at the Globe Theater, and that it was the resort of thieves and disorderly persons—were stated unnecessarily, and it is immaterial whether they are pleaded with that degree of certainty which will establish them as facts. \* \* \*<sup>23</sup>

<sup>23</sup> "Here the court of mayor and aldermen have not determined without evidence, for they have heard the parties and their witnesses, and have adjudicated that, in their discretion and sound consciences, Mr. Scales is not a fit and proper person to be alderman. They have acted, therefore, upon a reasonable and legal custom, and, having so acted, it appears to me that this court has not jurisdiction to disturb that conclusion to which they have come

## DEVIN v. BELT.

Court of Appeals of Maryland, 1889. 70 Md. 352, 17 Atl. 375.

YELLOTT, J. The Act of 1884, c. 283, § 5, local in its application and designated as the high license law of Prince George's county, provides that, in addition to the usual license required by the state, all applicants for liquor licenses shall, before obtaining said licenses, pay to the clerk of the circuit court the sum of one hundred dollars for the use of the public roads of said county. The act provides "that no spirituous or fermented liquors, or alcoholic bitters, shall be sold in any election district of said county except as provided for by section five," and it is further enacted "that each and every applicant, person or persons, house, corporation, company or association shall be recommended to the said clerk by five respectable freeholders of his or their immediate vicinity, as a fit person to traffic in the article."

Having conformed with the provisions of this act, the appellant obtained licenses to sell liquor at his storehouse in the town of Laurel, in Laurel district of Prince George's county, for the period of one year. The licenses were issued on the 1st of November, 1887.

according to their discretion and sound consciences. But then it is said that they ought to have set forth the grounds upon which they arrived at that conclusion. I think that this is one of those cases in which it is probably much better that the grounds should not be disclosed, because the circumstances which regulate the exercise of a discretion like this may be such that it would be extremely inconvenient for a traverse to be taken. It is unnecessary, however, to proceed upon that reasoning, because this return is sufficiently justified by the cases cited [*Rex v. Mayor of Stratford-on-Avon*, 1 Lev. 291 (1670); *Rex v. Burgesses of Andover*, 1 Ld. Raym. 710 (1701); *Rex v. Bishop of London*, 13 East, 419 (1811); *Queen v. Burgesses of Ipswich*, 2 Ld. Raym. 1240 (1705)], and more might have been adduced, which show that, where a corporate office is held *durante bene placito*, it is a sufficient return to a mandamus that the corporation have determined their pleasure; but if the corporation are so candid as to state their reasons, and allege bad ones, this court will in such cases interfere." *Rex v. Mayor and Aldermen of London*, 3 Barn. & Ad. 255, 273, 274.

"What scales have we to weigh the conscience of the bishop? And how are we to know whether he properly or improperly disapproves? May he not properly disapprove of the candidate for a lecturer's license on account of many matters which cannot be conveniently slated to a court of justice? May he not disapprove for matters within his own personal observation and knowledge; for the habits of life and conversation of the person, which might be known to him from residing in the same university or society with him, from his conduct in life down perhaps to the very time when the bishop is called upon to signify his approbation? Is he to exclude his own knowledge, the most material of any? Does the law say upon what proof he is to act, or that he is to have witnesses upon oath to the facts by which his judgment is to be guided? What authority has he to compel the attendance of witnesses before him? The word of the statute is 'approve'; and he must exercise that approbation according to his conscience, upon such means of information as he can obtain; and everything that can properly minister to his conscientious approbation or disapprobation, and fairly and reasonably induce his conclusion on such a subject, though it might not be evidence that that would be formally admitted in a court of law, may, I am of opinion, be fitly taken into his consideration." *King v. Archbishop of Canterbury*, 15 East, 117, 146 (1812).

At its session of 1888 the Legislature of Maryland enacted a law submitting to the voters of Laurel district the question in relation to issuing licenses to sell liquor in that district after the 1st day of May in said year, and the majority of votes determined the question in favor of prohibiting the issuing of licenses in said district. On the 1st day of June, 1888, the appellant applied to the clerk for transfers of his licenses to sell liquor, from Laurel to an adjoining district, claiming to be recommended by five respectable freeholders, living in the immediate vicinity of his new place of business. The transfers were refused by the clerk, who did not think that the appellant was recommended by five respectable freeholders living in his immediate vicinity. The record contains the recommendation of five persons who were unable to write, and therefore made their marks. The appellant then applied for a new state license. The clerk refused to grant a new license, because the appellant would not pay the \$100 required by law. He also assigned this as one of his reasons for refusing to make the transfers.

Upon this refusal the appellant applied for a writ of mandamus to compel the clerk to issue the new licenses or transfer the old licenses. The clerk filed his answer, the appellant demurred, and the demurrer was overruled. The appellant then filed a replication, to which there was a demurrer. This demurrer was sustained, and the court passed an order dismissing the appellant's petition. From this order an appeal has been taken.

It does not seem to be necessary to consider and determine many of the questions presented by the argument of counsel, for it is an established principle that a court will not issue a mandamus to compel a public officer to perform any act when its performance has been left by the lawmaking department of the government to the discretion and judgment of the officer. In *State ex rel. O'Neill v. Register et al.*, 59 Md. 283, this court decided that when an act rests by statute in the discretion of any person, or depends upon the exercise of personal judgment, mandamus will not lie. This doctrine has been recognized and seems to prevail in all the states of this country. "As to all acts or duties necessarily calling for the exercise of judgment or discretion on the part of the officer or body at whose hands the performance is required, mandamus will not lie." High on Extr. Rem. § 24; *State ex rel. Exchange Bank v. Board of Liquidators*, 29 La. Ann. 264; *Post v. Township of Sparta*, 64 Mich. 597, 31 N. W. 535; *State v. County Com'rs*, 21 Fla. 1; *Dalton v. State*, 43 Ohio St. 652, 3 N. E. 685.

The clerk of Prince George's county, in the performance of a duty imposed on him by law, had to determine, before he issued a license, that the appellant was recommended by five persons; that those five persons lived in the immediate vicinity of his place of business; that they were freeholders; and that, although so ignorant and illiterate that they could not write their names, they were re-



spectable freeholders. It is apparent that this question of respectability sometimes presents many difficulties. It was a duty incumbent on the clerk to solve this question, and he might not be able to arrive at a solution until after patient inquiry and the exercise of sound judgment and discretion, and a mandamus will not lie.

The appellant contends that, as he averred in his replication that he was recommended by five respectable freeholders in his immediate vicinity, the demurrer to the replication admits the truth of the averment. This argument is not supported by established principles. In *Brooke v. Widdicombe*, 39 Md. 400, the late Chief Judge Bartol, in delivering the opinion of this court, said: "The answer avers that the petitioner was not legally elected to the office; but that the respondent actually received a plurality of the votes cast. In the argument of the case it was earnestly insisted on the part of the appellant that the effect of the demurrer was to admit the facts thus stated in the answer, and consequently that the appellee is in the attitude of claiming an office to which he admits by his pleading he was not legally elected. Such is not the legal effect of the demurrer. It is well settled that a demurrer admits no other facts than those which are well pleaded. If facts are pleaded which are insufficient in substance, or immaterial, they are not admitted by the demurrer to be true; its office is to assert a legal proposition that the pleading demurred to is insufficient in law to maintain the case shown by the adverse party."

From what has been said it follows that the order appealed from must be affirmed.<sup>24</sup>

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### AMPERSE v. CITY OF KALAMAZOO.

Supreme Court of Michigan, 1886. 59 Mich. 78, 26 N. W. 222, 409.

Relator applied for an order to show cause why a mandamus should not issue requiring the common council of the city of Kalamazoo to act upon the approval of her bond as a liquor dealer in said city, which was granted, to which respondent made answer. The facts are stated in the opinions.

MORSE, J. \* \* \* Two reasons are urged why the writ should not issue in this case: First, because the relator is a married woman, living with her husband, and is therefore legally disqualified from lawfully engaging in the business of selling liquor; second, that the common council have a right to reject a liquor bond, and they are not required to give any reason for their action. \* \* \*

The duty of this board, under the statute, is a simple one. They

<sup>24</sup> See, also, *Post v. Township Board of Sparta*, 64 Mich. 597, 31 N. W. 535 (1887).

are concerned, under the law, solely with these questions: Is the bond proper in form and the penalty named therein sufficient? Are the bondsmen residents of the municipality and financially responsible for their undertaking? If they are not satisfied as to any of these matters, it is their duty to reject the bond, and to acquaint the petitioner with the ground upon which they reject it, so the bond may be remedied, if possible. If these questions are found in the affirmative, it is the duty of the board to approve it. They have no power to arbitrarily reject a bond without having any valid reason, or without assigning any good reason therefor. And we think the reason for rejecting a bond should appear of record. If not, then we shall have a common council rejecting a bond, each member of the body locking up in his own breast the reason therefor, and when called upon by a court to show the ground of their action, at liberty to assign any cause it may seem best, under the circumstances, whether it be the real cause at the time of their action or not. A person engaging in the sale of liquors is entitled to the same equal rights, under the law, as persons filing bonds under other circumstances, no matter what may be the opinion of individual members of the board, whose duty it is to approve the bond, as to the policy of the law or the character of the business; and no captious or arbitrary actions in depriving him of his rights can be tolerated by the courts.

It was held by this court, in *Parker v. Portland*, 54 Mich. 308, 20 N. W. 55, that when the board have exercised their judgment and discretion in good faith, and passed upon the bond, mandamus would not lie to control their decision or action, if there was no abuse of their discretion; but there is no authority in that case to sustain the arbitrary action of this board, who acted without any legal judgment or discretion, but, in the language of one of the members, took their chances of disobeying the plain mandate of the statute, and who, when called upon to explain or justify their action, return to this court, in substance: "We did this because we had the right and power to do it, and it is no one's business what our reasons were for rejecting this bond." It was expressly held in *Parker v. Portland* that, when the rejection of a liquor bond "was the result of prejudice and caprice," it would be the duty of this court to grant relief. Such is plainly the case before us. \* \* \*

The respondents in this case have seen fit to rest their cause upon the broad ground that their action is above and beyond the criticism of any other tribunal. Their answer assumes that they are the sole arbiters of the relator's right to engage in the business of selling liquor. Whether they have any good reason for their action for some cause they decline to inform us. In such case we can only assume that they have acted arbitrarily and without reason. To allow such action would be in plain violation of the statute, and a manifest disregard of the rights of the relator under it.

The writ of mandamus must issue in this case to respondents to approve forthwith the bond presented by relator, with costs in her favor.<sup>25</sup>

### STATE ex rel. COFFEY v. CHITTENDEN.

<sup>1</sup> Supreme Court of Wisconsin, 1902. 112 Wis. 569, 88 N. W. 587.

MARSHALL, J. It is elementary that in mandamus proceedings to coerce a judicial officer or any person or board in the exercise of judicial or quasi judicial power, the sole legitimate purpose thereof is to set such person or board in motion; to command him or it to act, not how to act, to exercise the judicial power vested in him or it; not to control as to the conclusion to be reached. *State v. Kellogg*, 95 Wis. 672, 70 N. W. 300; *State v. Johnson*, 103 Wis. 591, 623, 79 N. W. 1081, 51 L. R. A. 33; *State v. Teal*, 72 Minn. 37, 74 N. W. 1024; *Merrill*, Mand. 40. Where there is no reasonable ground to justify a decision by such officer or board other than one way, and there is a failure to act accordingly, the function of a mandamus proceeding is broad enough to remedy the mischief by compelling the making of such decision, in perfect harmony with the rule that the office thereof is not to control discretionary authority, but to compel the exercise thereof. *State v. Johnson*, supra. That is to say, if the law imposes the duty upon a judicial or quasi judicial body to do a particular thing upon determining that certain facts exist, and reasonable inquiry be made by it in respect to such facts, and from the information thus obtained there is no reasonable ground for any conclusion other than that the conditions precedent to the performance of such duty exist, and a decision is made to the contrary or performance thereof is refused, such conduct is not the exercise of discretionary power, but a refusal to exercise it—a refusal or neglect to perform a plain duty imposed by law; and, there being no adequate legal remedy, the way is open for the extraordinary jurisdiction of the court to award its writ of mandamus. It is plain that, in such a situation, the court does not deal with disputed facts. It acts upon the theory that the person or body in duty bound to find the facts in accordance with the evidence, in refusing to do so, goes beyond or refuses to exercise his or its jurisdiction, and is, on that ground alone, a subject for coercion by mandamus. *State v. Johnson*, supra. \* \* \* 26

<sup>25</sup> Accord: *State ex rel. Adamson v. La Fayette Co.*, 41 Mo. 221 (1867).

See, also, *Ex parte Candee*, 48 Ala. 386, 388-391, 396-400, 411-419 (1872), disapproved in *Ex parte Harris*, 52 Ala. 87, 93, 23 Am. Rep. 559 (1875).

<sup>26</sup> See a note in 6 Mich. Law Rev., p. 242.

The following cases in this collection are cases of mandamus: *State v. Justices*, 15 Ga. 403 (1854); *People ex rel. Sheppard v. Ill. State Board of Dental Examiners*, 110 Ill. 180 (1884); *Illinois State Board of Dental Examiners v.*



People, 123 Ill. 227, 13 N. E. 201 (1887); *Harrison v. People*, 222 Ill. 150, 78 N. E. 52 (1906); *Ex parte Sparrow*, 138 Pa. 116, 20 A. 711 (1890); *Ayers v. Hatch*, 175 Mass. 489, 56 N. E. 612 (1900); *People ex rel. Greenwood v. Board of Supervisors Madison Co.*, 125 Ill. 334, 17 N. E. 802 (1888); *Allbutt v. General Council*, 23 Q. B. D. 400 (1889); *People ex rel. Bush v. Collins*, 7 Johns. (N. Y.) 549 (1811); *Gage v. Censors*, 63 N. H. 92, 56 Am. Rep. 492 (1884); *People ex rel. Lodes v. Department of Health*, 189 N. Y. 187, 82 N. E. 187, 13 L. R. A. (N. S.) 894 (1907); *People ex rel. Fonda v. Morton*, 148 N. Y. 156, 42 N. E. 538 (1896); *U. S. ex rel. Roop v. Douglass*, 19 D. C. 99 (1890); *U. S. v. Black*, 128 U. S. 40, 9 S. Ct. 12, 32 L. Ed. 354 (1888); *U. S. v. Hitchcock*, 190 U. S. 316, 23 S. Ct. 698, 47 L. Ed. 1074 (1903); *People ex rel. Raster v. Healy*, 230 Ill. 280, 82 N. E. 599, 15 L. R. A. (N. S.) 603 (1907); *People ex rel. Post v. Healy*, 231 Ill. 629, 83 N. E. 453 (1908); *Volp v. Saylor*, 42 Or. 546, 71 P. 980 (1903); *Du Page Co. v. Commissioners of Highways of Town of Winfield*, 142 Ill. 607, 32 N. E. 269 (1892).

See, also, sections 48 and 54, *infra*.

## CHAPTER 9

CERTIORARI *Read.*

The writ of certiorari is used for the purpose of bringing up for review:

1. The judgment of a court, where appeal or writ of error is not a matter of right, but the higher court directs the case to be certified to it by the lower court for review. So under section 240 of the Judicial Code of the United States (28 USCA § 347).

2. The conviction of an inferior court of criminal jurisdiction. See, e. g., *Jackson v. People*, 9 Mich. 111, 77 Am. Dec. 491 (1860) post, p. 498.

3. The quasi judicial decisions of administrative authorities.

It is only the latter application which is to be here considered.

*Hawkins, Pleas of the Crown*, II, c. 27, one of the chief authorities for the writ, deals mainly with the second application.

For an account of the writ as an administrative law remedy, see an article by F. J. Goodnow on the Writ of Certiorari in 6 *Polit. Science Quarterly*, p. 493.

### SECTION 39.—AUTHORITIES AND ACTIONS SUBJECT TO WRIT

#### BALL v. PATTRIDGE.<sup>1</sup> *41*

Court of King's Bench, 1666. 1 Sid. 296.

By statute Car. II it is enacted that there shall be certain commissioners who shall have power to receive claims concerning the fens in Cambridge, Huntington, etc., and to decide the boundaries of them, and that they shall make decrees and return them in the petty bag in chancery. And motions were made several times for certiorari to remove the proceedings before the commissioners, and some were granted. But afterwards, on consideration of the statute, they resolve that no certiorari will lie. And if there shall be any [writ], it shall be procedendo, for (by The Court) this is a new judicature absolute in the commissioners by this new law, with which this court has nothing to do if they proceed according to the statute, for then it binds perpetually, but if they do not proceed according to statute then

<sup>1</sup> The original report is in Norman French.

all is void and coram non judice, and the parties are at liberty to examine this in an action brought at common law.

## 1 REX v. INHABITANTS IN GLAMORGANSHIRE.

Court of King's Bench, 1700. 1 *Ld. Raym.* 580.

Orders were made by the justices of peace, for levying money, for repairing Caerdiffe bridge, by virtue of the 23 *Eliz. c. 11.* And it was objected by Mr. Earle and Mr. Lechmore, that this court cannot in this case grant a certiorari; because it was a new jurisdiction erected by a new act of Parliament, the trust of the execution of which is reposed in the justices, and this court has nothing to intermeddle with it; for if they proceed according to the statute, then there is no reason to remove their orders; but if not, then what they do is coram non judice, and void. And the parties may examine the legality of their proceedings in an action; and so it was held in a case of decrees made by commissioners upon the act for the fens. 1. *Sid.* 296, *Ball v. Partridge*; *Hardr.* 480, *Terry v. Huntington*; *Cro. Car.* 394, *Nichols v. Walker*. And no certiorari lies to remove orders made by commissioners of bankrupts.

*Sed non allocatur.* For this court will examine the proceedings of all jurisdictions erected by act of Parliament. And if they, under pretence of such act, proceed to incroach jurisdiction to themselves greater than the act warrants, this court will send a certiorari to them, to have their proceedings returned here; to the end that this court may see, that they keep themselves within their jurisdiction; and if they exceed it, to restrain them. And the examination of such matters is more proper for this court. As in the case in question; whether the act of Queen Elizabeth impowers the justices to raise money to mend wears, and to determine the doubt upon the act. As to the cases of orders made by commissioners of sewers, and of the fens, the court is cautious in granting certioraris; and first they make inquiry into the nature of the fact, and what will be the consequence of granting the writ; because the country may be drowned in the mean time, whilst the commissioners are suspended by the certiorari. But that is only a discretionary execution of the power of the court. And as the commissioners of bankrupts he said, that they had only an authority, and not a jurisdiction. \* \* \*

Then exception was taken to the orders, that the money ordered to be levied was for repairing the wears, to do which they had no jurisdiction, but only to raise money for the repair of the bridge; and their authority being special, they ought to confine themselves within it. But *HOLT*, Chief Justice, held that, in regard that at the time of the making of the act, these wears were built as necessary to support the bridge, by virtue of the powers given by the act of



the queen for rebuilding of the bridge, and were esteemed so then and ever since, this court will esteem them accordingly still; and therefore consequential to the power for rebuilding and repairing of the bridge, and especially when they are averred to be so in the orders.

And GOULD and TURTON, Justices, agreed. \* \* \*<sup>2</sup>

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TREASURER OF CITY OF CAMDEN v. MULFORD.

Supreme Court of New Jersey, 1856. 26 N. J. Law, 49.

The CHIEF JUSTICE delivered the opinion of the court.

This action is brought by the treasurer of the city of Camden to recover of the defendant the expenses of paving Pine street, in said city in front of the premises of the defendant. \* \* \*

Whether the ordinances of a municipal corporation are subject to removal and review by writ of certiorari has recently been questioned by high judicial authority; and although the point was not mooted upon the argument of this case, its importance demands consideration. In the case of *People v. Mayor, etc., of New York*, 2 Hill (N. Y.) 11, Mr. Justice Bronson, in delivering the opinion of the court said: "The powers exercised by the common council of the city of New York are for the most part either legislative, executive, or judicial, and a certiorari only lies to inferior courts and officers who exercise judicial powers. If it were not for a few modern cases, I should be of opinion that we have no authority to supervise in this way the acts, ordinances, and proceedings of the corporation of the city of New York, or, indeed, of any other corporation, public or private. \* \* \* All our city and many of our village corporations have been vested with very large powers within their respective limits; and, if a certiorari will lie to remove into this court an ordinance for constructing a sewer, it is difficult to see where we can stop short of reviewing all their acts in the same way, which looks to me like a great stretch of jurisdiction." In the *Matter of Mt. Morris Square*, 2 Hill (N. Y.) 14, it was held by the same learned court (Mr. Justice Cowen delivering the opinion) that the acts of municipal corporations, if plainly judicial in their character, may be reviewed on certiorari. But he said a certiorari to reverse a mere corporate act is without precedent, though if it should be altogether

<sup>2</sup> "There was a mistake made by the commissioners of sewers, grounded upon this: that where St. 23 Hen. VIII, c. 5, says that the commissioners in several cases there mentioned shall certify their proceedings into chancery, afterwards by St. 13 Eliz. c. 9, it is enacted that thereafter the commissioners shall not be compelled to certify or return their proceedings, which they interpreted to extend to a certiorari; and thereupon they refused to obey the certiorari, but they were all committed; and yet the statute does not give authority to this court [King's Bench] to grant a certiorari, but it is by the common law that this court will examine, if other courts exceed their jurisdictions." *Groenvelt v. Burwell*, 1 Ld. Raym. 454, 469 (1699).

destitute of authority, and followed by a judicial decision, which would therefore be void for want of jurisdiction, the corporate act might be examinable on certiorari, as incidentally vitiating the latter.

The effect of the principle thus stated would seem to be that if a city ordinance directs a sewer to be built and a street to be paved, and provides that the expenses of the improvement shall be assessed upon persons benefited, the assessment, being of a judicial character, may be reviewed on certiorari, and the validity of the ordinance thus incidentally drawn in question. But if the ordinance directs not only that the improvement shall be made, but that the expenses shall be borne by the landholders by or over whose property it may pass, the party aggrieved is not entitled to protection by the writ of certiorari. Whatever may be the rule upon this subject adopted in other states, it is certain that the remedy by certiorari in this state is more extensive and efficacious, and rests upon broader, and, as we apprehend, upon more reasonable, ground. \* \* \*

Thus it is habitually used as a remedy against unlawful taxation, either for state, county, township, or city purposes; and while the remedy has been denied in other states, as dangerous or prejudicial to the public welfare, no such evil has been experienced from the use of the remedy, while it has been found eminently salutary and efficacious as a protection to private rights against oppressive and illegal taxation. \* \* \*

One of the most familiar uses of the writ is to test the validity of the proceedings of surveyors and freeholders in laying out and confirming of public highways, though, according to some of the authorities, the laying out of streets and highways is the mere exercise of municipal or corporate power, without the semblance of judicial decision. \* \* \*

In the courts of New York and Massachusetts it seems to be well settled that the certiorari lies only to examine the validity of such ordinances of a municipal corporation as are of a judicial character, not such as are legislative or ministerial in their nature. \* \* \*

But as to what constitutes a judicial act the authorities are by no means agreed. The Supreme Court of New York have repeatedly held that an ordinance directing a sewer to be built is not a judicial, but a ministerial, act. In *re Mt. Morris Square*, 2 Hill, 21; *People v. Mayor, etc., of City of New York*, 5 Barb. 43; *People v. Mayor, etc., of City of Brooklyn*, 9 Barb. 533. And this seems to be the opinion of Mr. Justice Vredenburg, in *State v. Newark*, 25 N. J. Law, 426. But in *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. (N. Y.) 467, 53 Am. Dec. 316, Mr. Justice Taylor, in delivering the opinion of the Court of Appeals, said the charter of the city of Rochester confers upon the common council power to cause common sewers, drains, vaults, and bridges to be made in any part of the city. The ordinance of the common council directing such public improvement is judicial in its nature, and extends immunity

from private action for damages to those who perform the duty. In *Parks v. Boston*, 8 Pick. 218, 19 Am. Dec. 322, the Supreme Court of Massachusetts held that the power vested in the mayor and aldermen of Boston, as to laying out or altering streets, whenever, in their opinion, the safety or convenience of the inhabitants shall require it, is judicial in its character.<sup>3</sup> But this is questioned and pronounced anomalous by Mr. Justice Cowen in *Re Mt. Morris Square*, 2 Hill, 22.

The true principle seems to be that ordinances directing the mere repairing or repaving of streets or reconstructing of sewers or bridges, which are enjoined upon municipal corporations as matters of duty, are purely ministerial, but that ordinances directing new streets to be opened or altered, new sewers to be constructed, or other similar public improvements to be made, by which the property of individuals is taken or affected, are in their nature judicial. So where a municipal corporation is authorized by ordinance to require the paving of streets, not as a matter of ordinary repair, but upon specified conditions only, and to impose the burthen not upon the city treasury, but upon a specific class of individuals, the ordinance is in its nature judicial. These powers and duties are in their character very similar, and in many particulars identical with those imposed by the act of Parliament (21 Hen. VIII, c. 5) upon the commissioners of sewers in England. The orders of these commissioners have always been held to be judicial in their character, and subject to review by certiorari. \* \* \*<sup>4</sup>

### DRAINAGE COM'RS v. GRIFFIN.

Supreme Court of Illinois, 1890. 134 Ill. 330, 25 N. E. 995.

BAILEY, J. This was a common-law writ of certiorari, brought to review certain proceedings of the commissioners of the Mason & Tazewell Special Drainage District. \* \* \* Said proceedings resulted in an order by said commissioners enlarging the boundaries of said district in accordance with the prayer of the petition. Various of the owners of the land thus annexed presented to the circuit court of Tazewell county their petition for a certiorari, alleging, among other things, that the proceedings by which the boundaries of said district had been enlarged were irregular, and without juris-

<sup>3</sup> In this case the writ of certiorari was allowed.

<sup>4</sup> Certiorari allowed to review action in laying out highways in *Commissioners of Highways v. Harper*, 38 Ill. 103 (1865); *People v. Brighton*, 20 Mich. 57 (1870); *Boston & Maine R. R. v. Folsom*, 46 N. H. 64 (1865); *State v. Fond du Lac*, 42 Wis. 287 (1877).

Certiorari not allowed to review tax proceedings in Michigan. *Whitbeck v. Hudson*, 50 Mich. 86, 14 N. W. 708 (1880).



diction or lawful authority on the part of said commissioners, and praying that the record of said proceedings be brought before said court, and that said order of annexation to or extension of the boundaries of said special drainage district, and the entry thereof in the records of said district, be reversed, set aside, and annulled. On said petition a writ of certiorari was duly issued and served, and thereupon said commissioners made return to said writ by certifying to said court the record of said proceedings. On inspection of said record, the court entered judgment quashing the same, and ordering that it be forever held for naught. Said judgment was affirmed by the Appellate Court (28 Ill. App. 561), and an appeal has now been taken to this court. \* \* \*

It is strenuously urged that certiorari is not the proper remedy, the contention being that the petitioners should have resorted to an information in the nature of a quo warranto. We need not pause to determine whether quo warranto would lie or not, as we know of no rule which, in this case, would make that remedy necessarily exclusive, even if it should be held to be a proper or available remedy. The only question is whether the alleged defects in the proceedings for the enlargement of the drainage district are such as can be reached and remedied by writ of certiorari, and this question is in no way dependent upon whether a writ of quo warranto might not also lie to oust the drainage commissioners of their control over the territory annexed, or to dissolve the organization of the drainage district so far as it applies to that territory. The writ of certiorari is a well-known common-law writ, and in England the court of King's Bench has always been in the practice of awarding it to inferior jurisdictions, commanding them to send up their records for inspection. By adopting the common law, we have adopted this as a recognized legal remedy, and in this state any court exercising general, common-law jurisdiction has, unless expressly forbidden to do so by the statute, an inherent authority to issue it. *People v. Wilkinson*, 13 Ill. 660; *Miller v. Trustees*, 88 Ill. 26; 3 Am. & Eng. Enc. Law, tit. "Certiorari." Neither in England nor in this state is it held to be a writ of right, but it issues, in proper cases, only upon application to the court, on proper cause shown.

We have repeatedly held that said writ may be awarded to all inferior tribunals and jurisdictions where it appears that they have exceeded the limits of their jurisdictions, or in cases where they have proceeded illegally, and no appeal is allowed, and no other mode is provided for reviewing their proceedings. *Gerdes v. Champion*, 108 Ill. 137; *Doolittle v. Railroad Co.*, 14 Ill. 381; *Railroad Co. v. Whipple*, 22 Ill. 105; *Railroad Co. v. Fell*, 22 Ill. 333. The purpose of the writ is to have the entire record of the inferior tribunal brought before the superior court to determine whether the former had jurisdiction, or had exceeded its jurisdiction, or had failed to proceed according to the essential requirements of the law. The

trial is solely by inspection of the record, no inquiry as to any matter not appearing by the record being permissible, and, if the want of jurisdiction or illegality appears by the record, the proper judgment is that the record be quashed.

Undoubtedly, where the controversy involves the investigation of facts not appearing upon the record, certiorari is not the proper remedy. Thus, if in the present case the right to have the proceedings by which the lands in question were annexed to the drainage district set aside, and the drainage commissioners ousted of the corporate authority they now claim to exercise over said lands, depended upon facts which could be established only by evidence dehors the record, the writ of certiorari would manifestly be of no avail. It may be admitted that in such case quo warranto would be the exclusive remedy. But here the want of jurisdiction, if it exists at all, appears upon the face of the record. If, then, the proceedings of the drainage commissioners enlarging the boundaries of the district constitute a subject-matter which may be reviewed by certiorari, that must be held to be an appropriate remedy.

The general rule seems to be that this writ lies only to inferior tribunals and officers exercising judicial functions, and the act to be reviewed must be judicial in its nature, and not ministerial or legislative. *Locke v. Lexington*, 122 Mass. 290; *State v. Mayor*, 34 Minn. 250, 25 N. W. 449; *In re Wilson*, 32 Minn. 145, 19 N. W. 723; *Robinson v. Supervisors*, 16 Cal. 208; *Ex parte Fay*, 15 Pick. (Mass.) 243; *Stone v. Mayor, etc.*, 25 Wend. (N. Y.) 157; *Esmeralda Co. v. District Court*, 18 Nev. 438, 5 Pac. 64; *Thompson v. Multnomah Co.*, 2 Or. 34. But it is not essential that the proceedings should be strictly and technically "judicial," in the sense in which that word is used, when applied to courts of justice. It is sufficient if they are what is sometimes termed "quasi judicial."

The body or officers acting need not constitute a court of justice in the ordinary sense. If they are invested by the legislature with the power to decide on the property rights of others, they act judicially in making their decision, whatever may be their public character. *Robinson v. Supervisors*, supra.

Thus it is held that this writ lies to review the proceedings of supervisors, commissioners, city councils, etc., in opening, altering, or discontinuing public streets and highways as to their legality, or regularity, though not as to the question of the expediency of such improvements. 3 Am. & Eng. Enc. Law, 65, and authorities cited in note 4. So, also, in some states, it has been held, subject to the foregoing qualification, to be the proper writ to correct illegalities in the levying of taxes and local assessments by assessors, commissioners, etc. (*Id.*), though in this state it has been refused where the defense of illegality could be made at the hearing of the application for judgment (*Pease v. City of Chicago*, 21 Ill. 500). The writ has also been held to lie to review the action of school trustees in uniting

and in dividing school districts (*Miller v. Trustees*, 88 Ill. 26; *State v. Whitford*, 54 Wis. 150, 11 N. W. 424); or of a town board in removing an assessor (*Merrick v. Town of Arbela*, 41 Mich. 630, 2 N. W. 922); or of a city council in removing a city officer (*Mayor v. Shaw*, 16 Ga. 172); or of a city council in granting a ferry license (*Ex parte Fay*, 15 Pick. [Mass.] 243); or of a board of supervisors in ordering an election to relocate a county seat (*Herrick v. Carpenter*, 54 Iowa, 340, 6 N. W. 574); or of a board of supervisors in creating the office of clerk of said board, and raising certain salaries which had been fixed by statute (*Robinson v. Supervisors*, 16 Cal. 208). The foregoing are a few of the many cases where this writ has been held to lie, and sufficiently illustrate the rules above stated.

The proceedings by which the boundaries of the drainage district in question were enlarged by the drainage commissioners were, at least in most of their important features, judicial in their character. The commissioners were required to ascertain and determine from evidence whether the requisite number of the adult owners of land in the district had signed the petition for the annexation of the adjoining lands, and whether the signers were the owners of the requisite proportion of the lands embraced within the district. They were also required to ascertain and determine from evidence whether the lands sought to be annexed to the district were involved in the same system of drainage, and required for outlets the drains of the district. When these facts were determined judicially, and not till then, were the commissioners authorized by the statute to enter their order annexing said lands. From their decision no appeal was given, nor were any other means provided by the statute for reviewing their proceedings. In every point of view then the case comes within that class of cases where certiorari is an appropriate remedy.

But, as the appellants insist that a different rule has been announced by this court in various of its decisions, we will briefly consider the cases to which we are referred as sustaining that contention. *Renwick v. Hall*, 84 Ill. 162, *Keigwin v. Commissioners*, 115 Ill. 347, 5 N. E. 575, *Evans v. Lewis*, 121 Ill. 478, 13 N. E. 246, and *Samuels v. Commissioners*, 125 Ill. 536, 17 N. E. 829, were all cases in chancery, and it was held that there was no jurisdiction in a court of equity, for the reason that there was a complete and adequate remedy at law, and that the legal existence of the several corporations involved in those cases could be determined by an information in the nature of a quo warranto. *Trumbø v. People*, 75 Ill. 561, *People v. Newberry*, 87 Ill. 41, *Osborn v. People*, 103 Ill. 224, and *Blake v. People*, 109 Ill. 504, were proceedings for the collection of either school taxes or special assessments, and the principle decided in those cases was that the various school districts and drainage districts in question in those several suits were at least corporations de facto, and that the legality of the organization



of a corporation could not be attacked collaterally. *Alderman v. Directors*, 91 Ill. 179, was trespass, and the plaintiffs were directors of a de facto district; and the same rule was there declared. In *Hinze v. People*, 92 Ill. 406, it was held that quo warranto would lie against persons who assume to hold offices supposed to be created by a law claimed to be invalid by reason of being in contravention of the Constitution; and in *People v. Board*, 101 Ill. 308, 40 Am. Rep. 196, it was held that quo warranto also lies against a corporation which undertakes to exercise powers which it does not possess.

There is nothing decided in any of these cases which shows or tends to show the validity of either of the propositions insisted upon by the appellants in this case. All that is determined by those cases may be admitted, and yet non constat that the common-law writ of certiorari does not lie in the present suit. No doubt some expressions were used in the opinions of several of those cases from which it might be inferred that an information in the nature of a quo warranto was the only mode of testing the legality of the formation of an existing de facto corporation, but that question did not arise and was not decided in those cases.

However, in the case of *Lees v. Commissioners*, 125 Ill. 47, 16 N. E. 915, it was expressly held that the common-law writ of certiorari cannot be resorted to for the purpose of determining whether a corporation has a legal existence, and that the validity of its organization can be questioned only by quo warranto. But there is this marked distinction between that case and this: There the corporate existence itself of a quasi municipal body was sought to be challenged by certiorari, while here such existence is fully admitted, and the only thing sought to be done is to call in question the validity of an order of a municipal body admitted to be a corporation both de facto and de jure, extending the boundaries of the drainage district. It seems eminently proper, and in consonance alike with the intention of the statute and the rules and analogies of the common law, that a proceeding, the object of which is to forfeit or destroy that corporate life which emanates solely from the sovereign power of the state, should be instituted by the attorney general or state's attorney of the proper county. It is said, in section 778, Ang. & A. Corp., citing in that behalf *Rex v. Pasmore*, 3 Term R. 244, 245, and *Regents, etc., v. Williams*, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72, that "a quo warranto is necessary where there is a body corporate de facto, who take upon themselves to act as a body corporate, but, from some defect in their constitution, cannot legally exercise the powers they affect to use." It appears, however, from the same section, and from the authorities there cited, that where there is a legally existing corporation, capable of acting, which has been guilty of an abuse of power, or of its franchises, then, not only will an information in the nature of a quo warranto lie, but scire facias as well.

✓ Nor do we perceive any good reason why a municipal body, which has exceeded its jurisdiction and has proceeded illegally, may not, on sound legal principles, be proceeded against by quo warranto, by scire facias, or by the common-law writ of certiorari, indifferently, as the one or the other may afford a proper and sufficient remedy. All of these several writs are direct remedies afforded by the law, and, in respect to neither of them, can it be said that it is a collateral attack upon the legal existence or organization of the corporation. As has already been suggested, this court has expressly held, in *Miller v. Trustees*, 88 Ill. 26, that the common-law writ of certiorari was an appropriate remedy to bring before the circuit court for review the proceedings of a board of trustees of schools consolidating two school-districts into one; and that seems to be going quite as far, if not further, than is demanded by the requirements of the present case. \* \* \* 5

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### ATTORNEY GENERAL v. MAYOR AND ALDERMEN OF NORTHAMPTON.

Supreme Judicial Court of Massachusetts, 1887. 143 Mass. 589, 10  
N. E. 450.

Petition, filed April 12, 1886, by the Attorney General, at the relation of the civil service commissioners of the commonwealth, appointed under St. 1884, c. 320, for a writ of certiorari to quash the proceedings of the respondents in the matter of the appointment of a police officer of Northampton, said appointment being alleged to be in violation of the rules prepared by said commissioners. The case was heard by W. Allen, J., and reserved for the consideration of the full court.

MORTON, C. J. We are of opinion that the petitioner has mistaken his remedy in this case. As was stated by Chief Justice Gray in *Locke v. Selectmen of Lexington*, 122 Mass. 290, "a writ of certiorari lies only to correct the errors and restrain the excesses of jurisdiction of inferior courts or officers acting judicially." It lies to correct the errors of inferior courts, or judicial officers, acting in proceedings not according to the course of the common law, and where errors cannot be corrected by appeal, or exceptions, or by a writ of error. *Lynch v. Crosby*, 134 Mass. 313.

Thus, it is the proper remedy to revise the proceedings of county commissioners, or of city councils, or of boards of aldermen, when they act in matters like the laying out of highways, or making assessments for sewers or other improvements. The reason is that, in such matters, they act judicially, and not merely as ministerial

<sup>5</sup> See *Kinsloe v. Pogue*, 213 Ill. 302, 72 N. E. 906 (1904), removal of county seat; *Moore v. City Council of Perry*, 119 Iowa, 423, 93 N. W. 510 (1903).

or executive officers. *Parks v. Boston*, 8 Pick. 218, 19 Am. Dec. 322; *Fay, Petitioner*, 15 Pick. 243; *Robbins v. Lexington*, 8 Cush. 292; *Dwight v. City Council of Springfield*, 4 Gray, 107; *Lowell v. County Commissioners*, 6 Allen, 131; *Farmington River Water Power Co. v. County Commissioners*, 112 Mass. 206; *Powers v. City Council of Springfield*, 116 Mass. 84; *Snow v. Fitchburg*, 136 Mass. 179. Numerous other cases might be cited, and they all go to show that the uniform rule in this commonwealth is, as we have stated above, that certiorari will only lie to revise the proceedings of tribunals or officers acting in a judicial capacity.

The appointment of police officers by the municipal authorities of a city cannot in any just sense be called a judicial proceeding. It is an important duty, and, like most administrative duties, involves the exercise of judgment and discretion; but it is administrative, and not judicial, in its character. No one has the right to be heard, and their decision is not, within the meaning of the law, an adjudication or judicial determination of any question or of the rights of any parties. *Opinion of Justices*, 138 Mass. 601.

We are therefore of opinion that certiorari is not the proper remedy. In this proceeding, it would not be in our power to afford the redress which the petitioner asks.

Petition dismissed.<sup>6</sup>

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PEOPLE ex rel. SCHAU v. McWILLIAMS et al., Civil Service Com'rs et al.

Court of Appeals of New York, 1906. 185 N. Y. 92, 77 N. E. 785.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Certiorari by the people, on the relation of John M. Schau, against John K. McWilliams and others, as municipal and state civil service commissioners, and others. From an order of the Appellate Division (91 N. Y. Supp. 675), sustaining the writ of certiorari, defendants appeal. Reversed.

CULLEN, C. J. On January 8, 1899, the civil service commission of Buffalo classified the position of battalion chief in the fire department in the competitive class. This action was approved by the state commission. On January 15, 1904, the fire commissioners requested the municipal commission to amend its classification and place the position in the exempt class. The municipal commission of April 27, 1904, recommended to the state commission an amendment of the rules providing that the position of battalion chief should be filled by promotion from the next lower grade in the department without competitive examination, but after a qualifying examination. The state commis-

<sup>6</sup> Accord: *People ex rel. McDonald v. Bush*, 40 Cal. 344 (1870). But see *Wildy v. Washburn* (N. Y.) 16 Johns. 49 (1819).



sion held a meeting in reference to the proposed amendment, but never determined to make or to refuse it. On July 12, 1904, the municipal commission submitted a further amendment, which did not take the position of battalion chief out of the competitive class. This latter amendment was approved by the state commission. The relator, a captain in the fire department of Buffalo, was appointed battalion chief to fill a vacancy on July 11, 1904. The municipal civil service commission refused to certify to the relator's pay on the ground that the appointment was unauthorized. Thereupon the relator obtained a writ of certiorari to review the action of the municipal and state civil service commissions in classifying the position of battalion chief as competitive. The Appellate Division, by a divided court, reversed the action of the commissions on the ground that a competitive examination for the place was not practicable. From that order this appeal has been taken.

At the threshold of the discussion the objection is taken that the action of the civil service commissions is not subject to review by certiorari. That whether a particular position in the civil service of the state or its subdivisions is or is not exempt from examination, does or may present a judicial question within the constitutional provision requiring appointments thereto to be made "according to merit and fitness, to be ascertained so far as practicable by examinations, which, so far as practicable, shall be competitive," has been held by this court. *Chittenden v. Wurster*, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809. Any other principle would allow the constitutional mandate to be violated with impunity. But granting that principle to its fullest extent, it by no means follows that the action of the civil service commission can be reviewed on certiorari. It is true that there are to be found in the opinions of this court statements that such actions may be so reviewed. I can find, however, no case except the one now before us where the Supreme Court has assumed to reverse the action of the civil service commission on certiorari. It is a well-settled principle that the common-law writ of certiorari issues to review only the decisions of inferior judicial or quasi judicial tribunals. *People ex rel. Copcutt v. Bd. of Health*, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522; *People ex rel. Trustees of Jamaica v. Supervisors Queens Co.*, 131 N. Y. 468, 30 N. E. 488; *People ex rel. O'Connor v. Supervisors Queens Co.*, 153 N. Y. 370, 47 N. E. 790.

> The question, therefore, is whether the action of the commissioners in classifying the relator's position in the civil service was judicial or quasi judicial. Here we must not be misled by names. The term "judicial" is used in judicial literature, in opinions and text-books in two distinctly different senses. The action of an administrative or executive officer or board may involve the exercise of judgment and their action is quite often termed "judicial." Thus in *Mills v. City of Brooklyn*, 32 N. Y. 489, it was held that the municipality was not liable for the insufficiency of a system of public sewers, because the ac-

tion of the municipal authorities in designing the system of sewerage was judicial. The word was here employed in an entirely different sense from that which is meant when we speak of judges as judicial officers, and the fact that public officers or agents exercise judgment and discretion in the performance of their duties does not make their action judicial in character so as to subject it to review by certiorari. *People ex rel. Corwin v. Walter*, 68 N. Y. 403; *People ex rel. Second Ave. R. R. Co. v. Bd. of Commissioners*, 97 N. Y. 37. Among the recent cases in this court on the subject is that of *People ex rel. Steward v. Board of R. R. Commissioners*, 160 N. Y. 202, 54 N. E. 697, where we upheld the action of the Appellate Division in reversing on certiorari the determination of the board of railroad commissioners granting the application of a railroad company for a certificate of public convenience and necessity. That decision proceeded on the ground that the commissioners were authorized and required to take evidence, and all the parties interested were entitled to notice and a hearing. The case represents the farthest limit to which we have extended the right of review of the acts of subordinate officers by certiorari.

On the other hand, we have the later decisions of the court in *People ex rel. Kennedy v. Brady*, 166 N. Y. 44, 59 N. E. 701, and *People ex rel. North v. Featherstonhaugh*, 172 N. Y. 112, 64 N. E. 802, 60 L. R. A. 768. In the first case, under a statute which provided that a person holding a position subject to competitive examination in the civil service could be removed or reduced in grade only after the reasons therefor had been stated in writing and filed with the head of the department, and the person so removed given an opportunity to make an explanation, it was held that the action of the head of the department in removing the subordinate was not judicial and was not subject to review by certiorari. It was there said by Judge O'Brien: "Official acts, executive, legislative, administrative, or ministerial in their nature or character, were never subject to review by certiorari. The writ could be issued only for the purpose of reviewing some judicial act. \* \* \* The relator was entitled to an opportunity to make an explanation and this he had. He was entitled to have the reasons for his removal expressed in writing and filed in the department, and this provision of the statute was complied with. He was not entitled to be sworn or to introduce witnesses with respect to the truth or merits of the reasons which were assigned for his removal. He was not entitled to a trial or a judicial hearing, and, manifestly, there was no trial or judicial hearing before the commissioner." In the second case, under a statute of the city of Cohoes a commission was required to adopt plans and specifications for a public improvement, to give public notice and a hearing to all parties interested before final adoption of the plans and specifications. It was held that the determination of the commission sought to be reviewed was neither judicial nor quasi judicial, and therefore not subject to review by certiorari.

Tested by these rules, it seems to me that a determination of the civil

service commissioners in classifying the position to which the relator aspired was in no sense a judicial one. It does not appear in the record that any testimony was taken by them, nor can I find in the statute any authority for the municipal commission to take testimony, though by section 6 the state commission is authorized to subpoena and examine witnesses in certain investigations, which seems scarcely to extend to the subject of making classifications. However that may be, the only legal evidence in the record is the rules established by the board of fire commissioners for the government of the department. The rest of the record is taken up with communications from various officials, the arguments of counsel, and the protests of citizens expressing their views and the views of officers of other municipalities upon the practicability or impracticability of subjecting applicants to competitive examination. I admit that the propriety of classifying this office as competitive or noncompetitive involves in a high degree the exercise of judgment, but the judgment is that of the legislative or executive officer rather than that of the judge. Its proper determination involves considerations which cannot well be the subject of judicial inquiry. I do not assert that the action of the commissioners in failing to so place offices which should, under the constitutional provision, be placed in the competitive class, is not subject to control, but as said by Judge Martin in *People ex rel. Sweet v. Lyman*, 157 N. Y. 368, 375, 52 N. E. 132, 134: "The obvious purpose of this provision (the constitutional one) was to declare the principle upon which promotions and appointments in the public service should be made, to recognize in that instrument the principle of the existing statutes upon the subject and to establish merit and fitness as the basis of such appointments and promotions in place of their being made upon partisan and political grounds. It then declares that merit and fitness shall be ascertained by examinations, and also the extent to which they shall be thus determined. The extent to which examinations are to control is declared to be only so far as practicable. This language clearly implies that it is not entirely practicable to fully determine them in that way. It was the purpose of its framers to declare those two principles, and leave their application to the direction of the Legislature."

If it should appear that there was a plain violation by the commission of its duty to classify as competitive an office which was clearly and manifestly so, there should be a remedy in the courts. But there is necessarily a large debatable field as to cases within which there will be great differences of opinion, even among the most intelligent and fair-minded men, and, as to this field, it seems to me that it is not reasonable that the judgment of an appellate court should be substituted for that of the commissioners. Yet, if the action of the civil service commission is to be reviewed by certiorari, there seems to be no escape from the conclusion that ultimately the classification of every officer or employé in the service of the state, or its political subdivisions, must be determined by this court, for if the classification



presents a question of law reviewable by the Supreme Court, that question survives this court. Surely such a result was never contemplated by the framers of the Constitution, or by the Legislature when it enacted the civil service laws. It would cast upon the courts a burden which would not only be difficult for them to bear, but which they are by no means the officers best qualified to discharge. The proper classification of a part of the civil service depends, in no small degree, on the practical operation of the classification. A priori arguments must often yield to actual experience. Take the present case. If we should affirm the action of the civil service commission, and it should appear in the future that the classification failed to secure competent officers, surely the classification should be changed. Should the action of the commission be again brought before us for review? It appears that in some of the cities of the state similar offices to that sought by the relator are filled by competitive examinations, and in others not. If the question of the classification is always a judicial one, then there must be the same classification everywhere, for there must be at least some degree of finality in judicial determinations.

It does not at all follow that the action of the civil service commission is not in any case subject to judicial control; but that such control is a limited and qualified one to be exercised by mandamus. If the position is clearly one properly subject to competitive examination, the commissioners may be compelled to so classify it. On the other hand, if the position be by statute or from its nature exempt from examination and the action of the commission be palpably illegal, the commission may be compelled to strike the position from the competitive or examination class, though in such case redress by mandamus would often be unnecessary, as a valid appointment could be made notwithstanding the classification. But where the position is one, as to the proper mode of filling which there is fair and reasonable ground for difference of opinion among intelligent and conscientious officials, the action of the commission should stand, even though the courts may differ from the commission as to the wisdom of the classification. The present case is of this character. We ought not to interfere with the determination of the commissioners that it should be filled by competition; and if they had decided that the position should be filled without competition, equally ought we to refrain from interference. The position lies in that field where the action of the commission should be final.

The general principle that mandamus will lie against an administrative officer only to compel him to perform a legal duty, and not to direct how he shall perform that duty, when the manner of performance is in his discretion, is not a valid objection to the use of that remedy. There is a limit to the exercise of discretion by an administrative officer which may be controlled by the courts, and of this we have an example in the case of *Baird v. Board of Supervisors of Kings County*, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81. In that case the board of

supervisors had divided the county into assembly districts under the provisions of section 5 of article 3 of the Constitution. The districts so laid out were grossly unequal in point of population. This court, while conceding that the proper discharge of the duty of division involved considerable discretion in the formation of the districts, held that the division was so unequal as not to be a compliance with the constitutional requirement. It was there said by Judge Peckham: "While it is impossible, in the nature of the case, to accurately describe and closely limit the amount of deviation from an equal representation that the practical working of the Constitution may in this respect permit, it is on the other hand sometimes quite possible to say of a particular example that it does or does not violate the constitutional mandate. We have no trouble whatever in detecting the difference between noon and midnight, but the exact line of separation between the dusk of the evening and the darkness of advancing night is not so easily drawn." In pursuance of the order of this court the supervisors made a new division. The validity of the second apportionment was challenged and the case again came to this court. *Matter of Whitney*, 142 N. Y. 531, 37 N. E. 621. There it was said that while the division was by no means a perfect one, it was not so unequal as to justify an interference by the courts. It seems to me that the cases cited indicate the true extent to which the court should assume to supervise the action of the civil service commission. If the classification of the commission clearly violates the Constitution or the statute, mandamus should issue to correct the classification. If the action of the commission is not palpably illegal the court should not intervene.

The foregoing views lead to a retraction of those expressed by us in *People ex rel. Sims v. Collier*, 175 N. Y. 196, 67 N. E. 309, where we held that the remedy was not by mandamus but by certiorari. In the opinion then rendered I fully concurred. That case was a proceeding by mandamus, and was properly decided on other grounds than those expressed by the opinion. The civil service scheme of the Constitution and of the statutes is comparatively of new operation in this state, and we must frankly admit that when we declared that the proper remedy was by certiorari we did not appreciate the results that would necessarily follow from such a review. We think it wiser to retract the declaration then made than, for the sake of consistency, to adhere to a rule which would lead to unfortunate and erroneous results.

The order of the Appellate Division should therefore be reversed, and the writ quashed. But as the relator sought his remedy by certiorari on the faith of our decision in the *Sims Case*, the order should be without costs to either party in this court or in the Appellate Division.

WERNER, J. (dissenting). While I concur in the practical result which will follow the adoption of the opinion written by the learned Chief Judge, I desire to record my dissent from the principal reason assigned in support of his conclusion. Although I agree with him as

to the limitations upon our jurisdiction to review the determination of boards of civil service commissioners in the classification of positions in the civil service, I take issue with him as to the remedy which should be invoked when such a review is sought. The question upon which we differ, stated in its most concrete form, is whether mandamus or certiorari is the proper writ in such a case as the one at bar. The learned Chief Judge asserts that mandamus is the appropriate remedy, while I maintain, and this court has decided in *People ex rel. Sims v. Collier*, 175 N. Y. 196, 67 N. E. 309, that certiorari is the legal and logical channel of review. I base this view upon the following considerations:

1. There is one, and only one, reference to the writ of mandamus in the Civil Service Law, Laws 1899, p. 809, c. 370, and that is found in section 21 which relates to the unauthorized removal from appointive positions of honorably discharged soldiers, sailors, and marines, and certain designated volunteer firemen. This mention of the writ in these specific instances is significant of the legislative intent. If the writ of mandamus had been intended for use in the review of all determinations of boards of civil service commissioners, why was it prescribed only in the cases set forth in section 21 of the statute? "*Expressio unius est exclusio alterius.*"

2. The office of the writ of mandamus is to compel specified action only in the exercise of purely ministerial functions. When the performance of an official act involves discretion and judgment, the courts, although clothed with power to command action, have no right to decide that it shall be pursued in a particular way or for the accomplishment of a stated result. Unqualified and unhampered action is all that may be commanded in such a case. *People ex rel. Harris v. Commissioners*, 149 N. Y. 26, 43 N. E. 418; *People ex rel. Francis v. Common Council of Troy*, 78 N. Y. 33, 34 Am. Rep. 500; *People ex rel. Myers v. Barnes*, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739; *People ex rel. Grannis v. Roberts*, 163 N. Y. 70, 57 N. E. 98. There are but few instances in which proceedings instituted by writ of mandamus would be broad enough in their scope to review the action of boards of civil service commissioners, and, if proceedings instituted by writ of certiorari are to be denied in such cases, it is equivalent to saying that there is no right of review whatever.

3. The writ of certiorari furnishes the appropriate remedy in such a proceeding. The article of the Code of Civil Procedure entitled: "The writ of certiorari, to review the determination of an inferior tribunal" (chapter 16, tit. 2, art. 7), expressly includes a public "body or officer" as among the inferior tribunals whose determinations may be thus reviewed, and section 2140 of that article enumerates the various subjects comprehended within the limits of judicial review. By that section the courts are given power, among other things, to decide: (1) "Whether the body or officer had jurisdiction of the subject-matter of the determination under review; (2) whether the authority con-



ferred upon the body or officer in relation to that subject-matter has been pursued in the mode required by law in order to authorize it or him to make the determination; and (3) whether in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator." There are two other subdivisions of this section which give the courts power to decide still other questions, but they are not germane to this discussion. I have quoted the foregoing subdivisions for the purpose of showing that upon a review of certiorari proceedings this court has the same power as in mandamus proceedings, to limit and control the questions that it will decide in reviewing the determination of a public officer or body. The learned Chief Judge says: "If the position is clearly one properly subject to competitive examination, the commissioners may be compelled [by mandamus] to so classify it." I argue that this cannot be done by mandamus, without violating the principle that the writ cannot issue to compel a particular kind of action for a stated result in a case involving the exercise of discretion and judgment; and that certiorari is the precise remedy to fit such a case.

We could have no better illustration than the proceeding at bar. Upon facts which are undisputed, the legal question is presented whether, under the statute, the board of civil service commissioners acted within its jurisdiction as to the subject-matter; whether the authority conferred was pursued in the manner required by law; and whether, in making its determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator. In deciding these questions against a relator, his right to a further review may properly be denied, upon the ground that the courts have no power to review the determination of a public board or officer, when it or he has proceeded within its or his jurisdiction, and in substantial compliance with the prescribed forms of law. That, as I understand it, is precisely what must be decided at the threshold of every review of a mandamus proceeding, and it is just what courts are daily called upon to decide in appeals from determinations of police commissioners, of commissioners to assess damages or compensation in condemnation proceedings, or for the opening of streets, and other kindred proceedings in which the decision of the tribunal of first instance is conclusive unless tainted with legal error. I agree that there is nothing sacred or inflexible in the meaning of the terms "judicial" or "quasi judicial" functions as applied to proceedings of this character. In their generally understood and accepted meaning they do not ascribe to lay public officers or bodies the judicial functions of courts of justice, but for want of more accurate terms they simply distinguish acts which are presumed to be the product of judgment based upon evidence, either oral or visual or both, as distinguished from those purely ministerial duties which can only be properly performed in one particular way.

The argument that the assumption, by this court, of jurisdiction in such proceedings as this will add greatly to the present judicial burdens is cogent, but not conclusive. The underlying and controlling question is whether the right of review in such a proceeding as this is one which can properly be exercised within the same limitations as inhere in the review of mandamus proceedings. I think, not only that it can be, but that there is no other appropriate proceeding by which the same result can be accomplished. Whenever it appears in a given case that the act sought to be reviewed presents no legal or judicial question, the writ of certiorari should be denied. *People ex rel. Kennedy v. Brady*, 166 N. Y. 44, 59 N. E. 701; *People ex rel. North v. Featherstonhaugh*, 172 N. Y. 112, 64 N. E. 802, 60 L. R. A. 768. But when, as in *People ex rel. Steward v. Board of R. R. Comrs.*, 160 N. Y. 202, 54 N. E. 697, the act or decision partakes of the judicial quality, and the question arises as to jurisdiction or legality of procedure, the writ will lie. *People ex rel. Copcutt v. Board of Health*, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522; *People ex rel. Trustees of Jamaica v. Board of Supervisors, Queens Co.*, 131 N. Y. 468, 30 N. E. 488; *People ex rel. Second Avenue R. R. Co. v. Board of Park Commissioners*, 97 N. Y. 37.

Whether the act of a public body or officer falls within one or the other of these rules depends upon the facts of each given case, and can usually be decided without much difficulty. In the case at bar the duty of classification imposed upon the board of civil service commissioners was one involving the exercise of judgment and discretion. It was exercised, however, by virtue of jurisdiction expressly conferred by the statute, and in substantial conformity to the then existing statutory regulations. For these reasons, I think, the writ should have been denied. But I entertain the view that if it had been made to appear that the board had acted without jurisdiction, or in contravention of the directions of the statute, a question of law would have been presented that would be properly reviewable in certiorari proceedings, and that could not be adequately dealt with in mandamus proceedings. Quite apart from the foregoing considerations, the writ herein should not have been issued because it was not granted and served within four calendar months after the determination of the board of civil service commissioners. Code Civ. Proc. § 2125.

For these reasons I concur in the conclusion reached by Chief Judge Cullen, without giving my assent to the reasoning by which it is supported.

O'BRIEN, HAIGHT, VANN, and WILLARD BARTLETT, JJ., concur with CULLEN, C. J.

WERNER, J., reads dissenting opinion.

HISCOCK, J., not sitting.

Order reversed, etc.

## In re STANDARD BITULITHIC CO.

Court of Appeals of New York, 1914. 212 N. Y. 179, 105 N. E. 967.

Appeal from Supreme Court, Appellate Division, Third Department.

Application by the State, on the relation of the Standard Bitulithic Company, for writ of certiorari to John N. Carlisle, Commissioner of Highways. From an order of the Appellate Division (161 App. Div. 191, 146 N. Y. Supp. 386), entered as resettled (147 N. Y. Supp. 1143), which reversed an order of the Special Term and granted the motion of respondent to dismiss the appeal and quash the writ of certiorari, relator appeals. Affirmed.

CHASE, J. A writ of certiorari was granted at Special Term upon the petition of the Standard Bitulithic Company directed to John N. Carlisle, commissioner of highways of the state of New York, commanding him to certify and return his proceedings, decision, and action in the matter of the cancellation of a contract between the state of New York and the Standard Bitulithic Company to build a state highway in the county of Suffolk, to the end that his decision and action might be reviewed and corrected.

We concur with the opinion of Presiding Justice Smith of the Appellate Division, wherein he says: "A writ of certiorari requires the respondent to certify a record. In the case at bar there is no record because there has been no trial. The highway commissioner would simply certify that he had been advised by his advisory board that the specifications were inadequate to a substantial highway. Upon that return the Special Term could make no determination. The act of the commissioner in revoking this contract is to my mind purely an administrative act."

There is nothing in the Highway Law directing the commissioner of highways in a proceeding such as the one herein considered to take testimony or give the parties interested an opportunity to be heard. A trial in any judicial sense is not contemplated. The sole question requiring consideration on this appeal is whether the act of the defendant in canceling the contract was a judicial act in nature or character. We think it was not.

A writ of certiorari is appropriate to review the judicial or semijudicial action of inferior courts or of public officers or bodies exercising, under the laws, judicial functions, and there is no authority unless it is expressly given by statute sanctioning its use for any other purpose. The action of the commissioner of highways was wholly administrative and not subject to review by certiorari. *People ex rel. Schau v. McWilliams*, 185 N. Y. 92, 77 N. E. 785; *People ex rel. Trustees Village of Jamaica v. Board of Supervisors of Queens Co.*, 131 N. Y. 468, 30 N. E. 488; *People ex rel. Kennedy v. Brady*, 166 N. Y. 44, 59 N. E. 701; *People ex rel. Copcutt v. Board of Health*,



Yonkers, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522; *People ex rel. North v. Featherstonhaugh*, 172 N. Y. 112, 64 N. E. 802, 60 L. R. A. 768; *People ex rel. R. & J. Co. v. Wiggins*, 199 N. Y. 382, 92 N. E. 789; *People ex rel. Graves v. Sohmer*, 207 N. Y. 450, 101 N. E. 164; *People ex rel. Lodes v. Department of Health, N. Y. City*, 189 N. Y. 187, 82 N. E. 187, 13 L. R. A. (N. S.) 894; *People ex rel. Hayes v. Waldo*, 212 N. Y. 156, 105 N. E. 961.

The question whether the commissioner of highways, in the administration of his office, had authority to cancel the contract is not considered.

The order of the Appellate Division should be affirmed, with costs.

WILLARD BARTLETT, C. J., and WERNER, HISCOCK, HOGAN, MILLER, and CARDOZO, JJ., concur.

Order affirmed.<sup>7</sup>

<sup>7</sup> See, also, *Rex v. Considine*, 1917, 2 Irish Rep. 1.

"The board of health did act, and had a right to act, upon its own inspection and knowledge of the alleged nuisance. It was not obliged to hear any party. It could obtain its information from any source and in any way, and hence its determination upon the question of nuisance is not reviewable by certiorari." *People ex rel. Copeutt v. Board of Health of City of Yonkers*, 140 N. Y. 1, 10, 35 N. E. 320, 323, 23 L. R. A. 481, 37 Am. St. Rep. 522 (1893).

But see, as to certiorari expressly granted by statute, *People ex rel. Fordham Church v. Walsh*, 244 N. Y. 280, 155 N. E. 575 (1927), *CARDOZO, C. J.*: "But the power of the board to do justice informally and promptly is not limited to cases where witnesses have been heard. Without any witnesses at all, it may act of its own knowledge, for, as constituted by the statute (Greater New York Charter, § 718), it is made up of men with special qualifications of training and experience. In that event, however, it must set forth in its return the facts known to its members, but not otherwise disclosed. To characterize the situation as a hardship without more does not tend in any substantial degree to enlighten a reviewing court. There must be disclosure of the facts from which hardship is inferred. We find neither evidence at the hearing, nor any statement, equivalent to evidence, by the board in its return, that this land, if not occupied by a garage, is incapable of application to a profitable use. The omission leaves the permit unsupported by the proofs. We thwart the scheme of the statute if we uphold a resolution for the concession of a privilege with neither evidence at the hearing, nor allegations in the answer to be accepted as a substitute for evidence. The Legislature has said that there shall be review by certiorari. Greater New York Charter, § 719-a. Such review becomes impossible if without supporting evidence or equivalent averment the mere conclusion of hardship is sufficient and indeed decisive. There has been confided to the board a delicate jurisdiction and one easily abused. Upon a showing of unnecessary hardship, general rules are suspended for the benefit of individual owners and special privileges established. Nothing is before us to justify or even suggest a doubt of the good faith and sincerity with which the power has been exercised. At the same time judicial review would be reduced to an empty form if the requirement were relaxed that in the return of the proceedings the hardship and its occasion must be exhibited fully and at large. Safeguards of this order have at times an aspect of triviality when our scrutiny is narrowed to one instance or another. Their value is perceived when the outlook is extended to something wider than particulars. Disclosure is the antidote to partiality and favor."

See, also, *Hughes v. Board of Appeals of Chicago*, 325 Ill. 109, 156 N. E. 350 (1927).

Certiorari to review action of railroad commission, see *People ex rel. Loughran v. Railroad Commissioners*, 158 N. Y. 421, 53 N. E. 163 (1899), consent to

## SECTION 40.—SAME—SCOPE OF REVIEW; WHAT KINDS OF ERROR CORRECTED

### JACKSON v. PEOPLE.

Supreme Court of Michigan, 1860. 9 Mich. 111, 77 Am. Dec. 491.

Certiorari to the recorder's court of the city of Detroit, where Jackson was convicted on a complaint for obstructing an alley in said city. \* \* \*

CAMPBELL, J.<sup>1</sup> The first question which arises is, how far are we at liberty to look into the proceedings returned by the recorder's court, to ascertain whether the recorder erred in any respect within our supervisory control?

It is claimed on behalf of the people that, upon a certiorari at common law, the only thing to be determined is whether the court below had jurisdiction, and that if jurisdiction existed the discretionary power of the court cannot be inquired into. And it is further claimed that the jurisdiction depends upon the subject-matter of the complaint. Applying this rule to the case before us, it is insisted that the recorder's court has jurisdiction of all complaints for obstructing alleys, and that, this jurisdiction being called into exercise by such a complaint, its proceedings thenceforth are not examinable unless an unauthorized judgment is given beyond the one allowed by law. As the same immunity from review applies to all special tribunals not acting according to the course of the common law, it becomes very important to ascertain how far this doctrine is correct; for, if true, it certainly gives them an extent of authority over persons and property not possessed by any of the higher courts.

There are certain classes of questions which, by the common understanding from time immemorial, belong to the course of judicial inquiry under the laws of the land. The common law, and the various charters and bills of rights, recognized and assured the right to such an inquiry. And the Constitution of this state, in apportioning the judicial power, as well as in affirming the immunity of life, liberty and property, has always been understood to guarantee to each citizen the right to have his title to property and other legal privileges determined by the general tribunals of the state. These municipal courts, so far as they act under city by-laws, are not designed to decide between man and man, or to administer general laws. They are ordained to prevent disorder in matters of local convenience, and to regulate the use of public and quasi public

discontinuance of station; *People ex rel. Steward v. Board of Railroad Commissioners*, 160 N. Y. 202, 54 N. E. 697 (1899), consent to building railroad.

Rate order held not reviewable by certiorari, because legislative. *Cumberland, T., T. Co. v. State*, 135 Miss. 835, 100 So. 378 (1924).

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easements so as to prevent confusion. If, in exercising this power, they can incidentally decide upon the rights of private property, so as to determine its enjoyment without review, there would seem to be a practical annihilation of the right to resort to the general tribunals and the common law. The consequences of such a doctrine, whether correct or incorrect, are serious enough to render it our duty to examine very carefully into its foundations.

The power of reviewing upon certiorari judicial proceedings of inferior tribunals and bodies not according to the course of the common law has long been exercised in England, as well as in this country. The power has been jealously maintained, and has been deemed necessary to prevent oppression. It must be apparent to any one that if the superior court could only examine into the right of the inferior one to enter upon an inquiry, without reference to the manner in which that inquiry is conducted, this remedy would be of small account.

In New York, a series of decisions have appeared from time to time, asserting that when certiorari is given by statute it lies to correct any legal mistakes, but where issued as at common law it can only review the jurisdiction of the court below. It is unnecessary to refer particularly to these authorities, inasmuch as in *Morewood v. Hollister*, 6 N. Y. 309, this distinction seems to be regarded as unfounded, and the office of the writ is considered as reaching all errors of law. We have examined with much care all the English authorities within reach bearing upon this subject, and have found nothing whatever to give color to such a distinction. There are, indeed, cases where a certiorari lies to examine errors generally, and others where it lies only to inquire into the jurisdiction; but the distinction arises out of very different considerations. This will appear by reference to some of the cases in which questions of jurisdiction have been reviewed.

There are many statutes in England which, not only in large classes of summary convictions, but also in special proceedings for condemning lands, and for other purposes, take away, in express terms or by acknowledged implication, the right to a certiorari, which otherwise existed. In some cases an appeal lies to review the whole proceeding; in others, it is subject to no further examination on the merits. In all these cases it is held that a statute taking away the right to a certiorari does not deprive the aggrieved party of the right to sue out such a writ where the proceeding has been without jurisdiction. And the want of jurisdiction, when arising from matters not appearing in any way on the proceedings, may even be shown aliunde by the affidavits. 8 Ad. & El. 413; 11 Ad. & El. 194; 5 B. & C. 816; 10 B. & C. 477; 5 Ad. & El. 626; 2 Man. & Ry. 397; 13 Q. B. 988; 15 Q. B. 121. \* \* \*

If certiorari will lie for want of jurisdiction in cases where the common-law remedy of certiorari, in its usual acceptation, is expressly or confessedly taken away, it follows as an unavoidable conclu-



sion that the usual office of the common-law writ is to inquire into something more than jurisdiction. This may be made more plain by examining what is required to be returned.

It was held in *Rex v. Killett*, 4 Burr. 2063, that it is necessary to set out the evidence upon a conviction, that the court may judge whether the justices have done right.<sup>8</sup> And in *Rex v. Read*, 2 Doug. 486, it was held that a conviction is bad unless it does set forth the evidence. The same doctrine is laid down in *Rex v. Clarke*, 8 T. R. 220; *Rex v. Smith*, 8 T. R. 588; *Regina v. Tuck*, 10 Q. B. 540. And where the evidence set out is not sufficient to justify a conviction, or other judicial act complained of, it will be quashed on certiorari. 8 T. R. 588; 3 B. & Ald. 596; 2 Chit. 578; Cowp. 728; 2 B. & Ald. 378; 6 T. R. 177; 4 Ad. & El. 216; 4 Ad. & El. 205; 3 Q. B. 790.

The office of a certiorari is not, however, to review questions of fact, but questions of law. And in examining into the evidence the appellate court does so, not to determine whether the probabilities preponderate one way or the other, but simply to determine whether the evidence is such that it will justify the finding as a legitimate inference from the facts proved, whether that inference would or would not have been drawn by the appellate tribunal. It is said in *The King v. Daman*, 2 B. & Ald. 378, that "all the facts necessary to subject the party to the penalty imposed by the act of Parliament must appear upon the information, and be established by proof." And in *The King v. Davis*, 6 T. R. 177, it is said: "It is sufficient in convictions if there were such evidence before the magistrates as in an action would be sufficient to be left to a jury." The same principles are recognized in the other cases above cited; also in *Rex v. Glossop*, 4 B. & Ald. 616, and *Regina v. Bolton*, 1 Q. B. 67.

Where facts exist which, if apparent, would have ousted the jurisdiction, they have been allowed to be set forth in the affidavits of the relator, and a response required. Instances of this occur where the magistrate acting was disqualified by interest or other similar cause. 1 Q. B. 67; 1 Q. B. 467; 6 Q. B. 753. And in *Regina v. Gillyard*, 12 Q. B. 527, a conviction was quashed, although perfectly regular, because it was made to appear that it was obtained fraudulently.

The same principles which require a conviction to be quashed when upon the facts and the law applicable to them the case is insufficient to justify it would seem to require that rulings of law upon the admission or exclusion of evidence should be reviewed. And such we find to have been the practice. In the case of *Regina v. Cheltenham Com'rs*, 1 Q. B. 467, the rate complained of was

<sup>8</sup> The case adds: "But upon an order it is not necessary, because the court will presume that they have done right."

quashed because certain interested magistrates voted upon the admission of evidence, the court holding this a decision which might have had an important influence upon the result, and therefore sufficient to avoid the whole action, whether the interested magistrates took any further part or not. And in this case the statute had expressly taken away the writ of certiorari; and it was issued, and the case decided, on the ground that the question from its bearing became one of jurisdiction. And in *Regina v. Justices of Hertfordshire*, 6 Q. B. 754, the proceedings were quashed because an interested magistrate had sat during a portion of them, although he withdrew before they were completed. The questions of law arising either upon the admission of evidence, or the other rulings in the proceedings, must always have a bearing on the result, and the appellate court cannot, generally, at least, assume that any of them have not contributed to it. In *Regina v. Justices of Staffordshire*, 30 Eng. L. & Eq. 402, where certiorari was expressly taken away by statute, a writ was allowed, and a conviction under a local by-law quashed, because the justices had ruled that an approval of the by-law by the Secretary of State made it binding, and therefore refused to consider its validity. The Court of Queen's Bench held the by-law invalid, and so quashed the conviction.

We are therefore of opinion that the return to the certiorari is all properly before us, and that the law contemplates that it shall be full, both upon the evidence and upon the decisions and rulings. \* \* \*<sup>9</sup>

PEOPLE ex rel. CITIZENS' GAS LIGHT CO. OF BROOKLYN  
v. BOARD OF ASSESSORS OF CITY OF BROOKLYN.

Court of Appeals of New York, 1868. 39 N. Y. 81.

MASON, J. \* \* \* The office of this writ of certiorari, when issued out of the Supreme Court to review the proceedings and determination of inferior tribunals, has fixed limits that may be regarded as settled by the adjudged cases in this state, although it must be conceded that there is great conflict in the decisions when we get beyond a certain point in the functions of the writ. I think we may safely say that the following rule may be deduced from adjudged cases in this state, viz.: That its office extends, unquestionably, to the review of all questions of jurisdiction, power and authority of the inferior tribunal to do the acts complained of, and all questions of regularity in the proceedings; that is, all questions whether the inferior tribunal has kept within the boundaries pre-

<sup>9</sup> That a provision taking away certiorari does not apply where there is a clear absence of jurisdiction, see *Ex parte Bradlaugh*, 3 Q. B. D. 509 (1878).

scribed for it by the express terms of the statute law or by well-settled principles of the common law. \* \* \*

I cannot assent to the proposition that when the Supreme Court have issued the writ, heard the case upon the return, and have committed a plain error in law, and have come to the conclusion, erroneously, as in this case, that the assessors have kept within the boundaries prescribed by the statutes, and therefore hold that the relators can take nothing by the writ, and give judgment quashing the writ—that such judgment is not subject to review in this court. The judgment of the Supreme Court, in such a case, is not rendered upon the ground that the proceedings ought not to be reviewed by the writ, or that it was improvidently issued, but upon the ground that the allegations of error have not been sustained in the given case. Since the decision of the several suits growing out of the tax assessments in the city of Poughkeepsie,<sup>10</sup> there is no redress to the citizen against illegal assessments like this, if it is not afforded upon this common-law writ of certiorari, which it certainly can be, so far as to require the assessors to keep within the rules of law, and comply with terms prescribed by the statute. \* \* \*<sup>11</sup>

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PEOPLE ex rel. BODINE v. GOODWIN et al.

Court of Appeals of New York, 1851. 5 N. Y. 568.

RUGGLES, C. J. Neither the commissioners of highways, nor the referees on appeal from their decision, have power to lay out a road public or private through any building without the consent of the owner. 1 Rev. St. p. 502, § 3, and page 513, § 57. There was a barn standing on the land laid out for the highway in controversy; and unless the owner's consent was given that the highway should be so laid out, the referees in laying it out acted without authority, and their proceedings were void for want of jurisdiction. *Clark v. Phelps*, 4 Cow. 190. Inferior magistrates, when required by writ of certiorari to return their proceedings, must show affirmatively that they had authority to act; and where, as in the present case, their authority and jurisdiction depend upon a fact to be proved before themselves, and such fact be disputed, the magistrate must certify the proofs in relation to it, for the purpose of enabling the higher court to determine whether the fact be established. The decision of the magistrate in relation to all other facts is final and conclusive, and will not be reviewed on a common-law certiorari.<sup>12</sup> But

<sup>10</sup> See *Foster v. Van Wyck*, 2 Abb. Dec. (N. Y.) 167 (1867), denying remedy against the assessors and collector, and *Swift v. Poughkeepsie*, 37 N. Y. 511 (1867), denying remedy against the city on implied contract.

<sup>11</sup> See *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444, 9 Am. Rep. 591 (1872).

<sup>12</sup> See, however, *People v. Board of Police*, 39 N. Y. 506 (1868), post, p. 503.



the main object of this writ being to confine the action of inferior officers within the limits of these delegated powers, the reviewing court must necessarily re-examine, if required, the decision of the magistrate on all questions on which his jurisdiction depends, whether of law or of fact. The evidence, therefore, to prove the consent of the owner of the land to the laying out of the road, was properly stated on the return, and is properly examinable here. \* \* \* 13

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PEOPLE *ex rel.* COOK *v.* BOARD OF POLICE OF METROPOLITAN POLICE DISTRICT OF STATE OF NEW YORK.

Court of Appeals of New York, 1868. 39 N. Y. 506.

Appeal from judgment of the Supreme Court in General Term of the First District, affirming a judgment of the Special Term on certiorari, by which a judgment or order of the appellants, imposing a fine upon the relator, was reversed and annulled.

The relator was a member of the police force of the Metropolitan police district, and patrolman of the Ninth precinct, and it appeared by the return, that, on the 19th of January, 1863, a charge of neglect of duty was preferred against him, the specification of which was absence from duty, and from the station house of the Ninth precinct, from October 26, 1861, to the 8th day of January, 1863—a period of 439 days. Upon this he was tried by the appellants, and, on the 14th of February, 1863, the judgment of the board was pronounced, whereby they find him guilty of the matters charged, and therefore order and adjudge that he be fined the amount of 439 days' pay, and that his pay for that number of days be, and the same is, hereby forfeited.

In obedience to the precept of the certiorari, the return of the appellants set out the charge, the notice thereof to the relator, and the requirement to appear and answer, and notice of the time and place of trial, the relator's written admission of due personal service upon him of the complaint, charges, specifications and notice of trial, and also the testimony and proofs taken on the trial, certain of the rules and regulations of the appellants, with the finding and judgment of the appellants, convicting him of the charge, and imposing the fine. The case is certified to have closed on the 10th of February; the judgment was rendered on the 14th.

<sup>13</sup> Accord: *Whitney v. Board of Delegates*, 14 Cal. 479, 500 (1860); *Stumpf v. Board of Sup'rs*, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350 (1901); *Stone v. Miller*, 60 Iowa, 243, 14 N. W. 781 (1882).

Contra: *Chicago & Rock Island R. Co. v. Whipple*, 22 Ill. 105, 108 (1859): "It is not the practice to ascertain from extrinsic evidence whether the inferior court had jurisdiction or had proceeded according to law, but to determine these questions by the record." *Whittaker v. Venice*, 150 Ill. 195, 203, 37 N. E. 240 (1894).

WOODRUFF, J.' The board of police for the Metropolitan district had jurisdiction of the subject-matter of the charge, of the charge itself, and of the person of the relator who appeared on the trial before them. It is not objected that the judgment is not such as, upon due conviction, they had authority to pronounce and carry into effect.

The question thereupon arises, which I think the principal question on this appeal, may the court, on a common-law certiorari, go beyond the inquiry whether the inferior tribunal had jurisdiction, and was the proceeding and judgment within that jurisdiction? Other questions, it is true, were raised and discussed; but, in the view that I take of the case, it will be unnecessary to consider them. Some of them, in my judgment, are mere questions of form or practice, which are clearly not open to review.

It is insisted that, on the trial, there was no evidence that the relator was guilty of the offense charged; that the actual facts were undisputed; that the alleged neglect of duty, and the only neglect of duty in any wise appearing, was his absence during the period of his dismissal from the force; and that it was error in law to hold that an offense, and convict and pronounce judgment thereupon.

If, as insisted by the appellants, the court cannot, on certiorari, look into the evidence, nor the rulings thereupon, with a view to the correction of errors in law committed on the trial, then the particular facts upon which the finding of guilty was based cannot be considered. Jurisdiction appearing, and the judgment being within that jurisdiction, the judgment is to be deemed, on this certiorari, conclusive. It has often been said that a common-law certiorari brings up the record only, and not the evidence, which forms no part of the record, and, if so, then the circumstance that, in the particular case, the inferior tribunal was required by the writ to return, and did return, the evidence, does not enlarge the field of review, or bring any other than jurisdictional questions under examination.

That this is the extent and limit of the review by a common-law certiorari was many times stated in the former Supreme Court, and has been often stated in the present Supreme Court. \* \* \* It would be idle to attempt to harmonize the various decisions and dicta above referred to. \* \* \*

It is true that the court in the later cases has taken a more liberal view of the office of a common-law certiorari, and the power of review thereby, than was expressed by the Supreme Court during many years. \* \* \* My own conviction of the importance of the question, in view of the great number of proceedings of a summary character in which powers are exercised which affect valuable rights both of person and property, has led me to collect and compare the more prominent cases on this subject; and I cannot resist the belief that a disposition has been manifested to limit the office of this most useful writ within too narrow limits.

Let it be once established that where an officer or board of officers have jurisdiction of the subject or of the persons to be affected, and proceed in its exercise according to the prescribed mode or forms, their determination is final and beyond the reach of any review, whatever errors in law they may commit, and however clear it may be upon undisputed facts that their judgment, decision or order is not warranted, and there is danger that much of injustice and wrong may happen without possibility of redress.

On the other hand, to hold that conclusions of fact upon conflicting evidence and matters of mere detail, in the order or mode of proceeding, not violating any rule of law, to the prejudice of the party, and matters which are clearly submitted to the judgment or discretion of the inferior tribunal, where the evidence presents a case for its exercise, can be so reviewed, would be in conflict with all of the previous adjudications, and produce great inconvenience and embarrassment.

It may be desirable not to multiply cases in which the appellate courts can be called upon to interfere in matters of small importance, but that furnishes no reason for denying the power to see that the rules of law are not violated, when wrong is done, and no great public inconvenience will result from its exercise.

I conclude, therefore, that in the case before us the Supreme Court had power, and that on this appeal this court have power, to examine the case upon the whole of the evidence, to see whether, as a matter of law, there was any proof which could warrant a conviction of the relator, of the charge of neglect of duty, by absence from duty as a patrolman of the Ninth precinct, from the 26th of October, 1861, to the 8th of January, 1863.

If there was no evidence of neglect of duty—if the case was such at the close of the trial that it would have been erroneous to submit the question to the jury, were the like question before a jury in an ordinary action—then the error is an error in law, and the conviction was illegal. It rests upon no finding of facts upon evidence tending to sustain such finding; but as matter of law the relator was entitled to be acquitted of the charge. \* \* \* <sup>14</sup>

<sup>14</sup> Accord: *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444, 9 Am. Rep. 591 (1872).

Arnoux, J., in *Matter of Lauterjung*, 48 N. Y. Super. Ct. 308. (1882), said: "Until the decision of the Court of Appeals in the year 1868, in the case of *People ex rel. Cook v. Board of Police*, 39 N. Y. 506 [in which Judge Arnoux was counsel for the relator], the tendency of the courts in certiorari cases was to refuse to examine into the evidence or to determine any question beyond that of jurisdiction. This permitted inferior tribunals and magistrates to exercise their powers in an arbitrary, high-handed and unjustifiable manner, and made them more absolute than any court of original jurisdiction. The case above cited brought to the attention of the court an illustration of the despotic action that such boards may take when beyond the reach of review. \* \* \* There able counsel contended that the court was bound by the record. This question was examined with exhaustive research by that distinguished ornament of the bench, the late Judge Woodruff, and the able opinion that he wrote, unanimously concurred in by the other judges of the court, marks a new departure in the law relating to certiorari in this state."



## NEW YORK CIVIL PRACTICE ACT, §§ 1286, 1304, 1305.

Sec. 1286. Except as otherwise expressly prescribed by a statute, a writ of certiorari cannot be issued in either of the following cases:

1. To review a determination which does not finally determine the rights of the parties, with respect to the matter to be reviewed;

2. Where the determination can be adequately reviewed, by an appeal to a court or to some other body or officer;

3. Where the body or officer making the determination is expressly authorized by statute to rehear the matter, upon the relator's application; unless the determination to be reviewed was made upon a rehearing, or the time within which the relator can procure a rehearing has elapsed.

Sec. 1304. The questions, involving the merits, to be determined by the court upon the hearing, are the following, only:

1. Whether the body or officer had jurisdiction of the subject-matter of the determination under review;

2. Whether the authority, conferred upon the body or officer, in relation to that subject-matter, has been pursued in the mode required by law, in order to authorize it or him to make the determination;

3. Whether in making the determination, any rule of law, affecting the rights of the parties thereto, has been violated, to the prejudice of the relator;

4. Whether there was any competent proof of all the facts, necessary to be proved, in order to authorize the making of the determination;

5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence of any of those facts, that the verdict of a jury, affirming the existence thereof, rendered in an action in the Supreme Court, triable by a jury, would be set aside by the court, as against the weight of evidence.

Sec. 1305. The court, upon the hearing, may make a final order, annulling or confirming, wholly or partly, or modifying, the determination reviewed, as to any or all of the parties.<sup>15</sup>

<sup>15</sup> See *People ex rel. McAleer v. French*, 119 N. Y. 502, 507, 508, 23 N. E. 1061 (1890).

As to certiorari in connection with taxation, under statute, see *People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 417, 46 N. E. 875 (1897), and an article by Julian T. Davies, 1 Col. Law Rev. p. 419.

"Here we must take note of the difference between jurisdictional error as to a court proceeding according to the course of the common law and such error as to a mere tribunal exercising quasi judicial authority. In the former, jurisdiction of the party and subject-matter being established, the determination cannot be successfully challenged for such error, though the basic questions of fact rest upon insufficient evidence, or have no foundation whatever therein. The judgment in such circumstances may be erroneous, but not reversible upon writ of certiorari for jurisdictional defect. In the latter, a clear violation of law in reaching a result within the power of the tribunal to reach proceeding properly is jurisdictional error. In the former, the evidence is not reviewable at all. In the latter, it may be reviewed, but only to the extent of determining whether there is evidence up-

on which the tribunal could reasonably and honestly have reached the conclusion which it did. The evidence cannot be weighed for the purpose of determining whether the same clearly preponderates against the decision. It may be looked into only to see whether there was competent evidence sufficient, in reason, to incline the mind efficiently to the conclusion reached. In the first a conclusion without any credible evidence to support it, or any evidence at all, is mere judicial error. In the second, want of credible evidence which, in case of the verdict of a jury, would be sufficient upon appeal to require a reversal is jurisdictional error—error committed outside of jurisdiction, instead of in the exercise of jurisdiction, where the writ takes hold, performing its function of returning the tribunal to its proper sphere of action." *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 107 N. W. 500 (1906).

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PEOPLE *ex rel.* MALONEY *v.* LINDBLOM.

Supreme Court of Illinois, 1899. 182 Ill. 241, 55 N. E. 358.

Appeal from the circuit court of Cook county.

Petition for a common-law writ of certiorari, brought in the name of the People, on the relation of John Maloney, against Robert Lindblom, Edward Carroll, and John W. Ludwig, Civil Service Commissioners.

Mr. Justice CRAIG delivered the opinion of the court.

It will be observed upon an examination of the prayer of the petition that the petitioner asks that the certification of Aaron L. Brown may be rescinded and revoked, and that the name of the petitioner, John Maloney, may be certified by the commission to the commissioner of public works in lieu of the name of Aaron L. Brown. It is apparent from the prayer of the petitioner that the scope and purpose of a common-law writ of certiorari are misconceived by him. This is not a proceeding in which the certification of Brown by the civil service commission can be set aside by the court, and the petitioner, John Maloney, placed in his stead, nor is it a contest in which the right of one of the parties to the place in question may be set aside and the other sustained. The only office of the writ of certiorari is to bring before the court the record of the proceedings of the inferior tribunal for inspection, and the only judgment to be rendered is that the writ be quashed or that the record of the proceedings be quashed. *Chicago & Rock Island Railroad Co. v. Fell*, 22 Ill. 333.

The petitioner seems to be laboring under another misconception in regard to his rights and the power of the court in a proceeding of this character. The inferior tribunal, where the record is brought before the court by writ of certiorari, may have erred in its rulings on questions of law during the progress of the trial, or it may have erred in the application of the law to the facts in reaching its final judgment, and yet those errors cannot be reviewed and corrected in a proceeding of this character. On a return to a writ bringing the record before the court the only proper inquiry is whether the inferior tribunal had jurisdiction and proceeded legally—i. e., followed the form of proceedings legally applicable in such cases—and not whether it

correctly decided the questions arising upon the admission or exclusion of evidence, the giving and refusing of instructions, and other like questions, during the progress of the trial. The rulings of a court may be erroneous and yet it may have jurisdiction and proceed legally. *Hamilton v. Town of Harwood*, 113 Ill. 154. The rule announced in the case cited has been fully sustained by other cases. *Donahue v. County of Will*, 100 Ill. 94; *Scates v. Chicago & Northwestern Railway Co.*, 104 Ill. 93. Here the jurisdiction of the civil service commission is not disputed, and it is apparent that the tribunal proceeded according to the forms of law applicable in such cases.

But it is said that the civil service commission made an erroneous decision in holding that Aaron L. Brown, who was engaged in the military service of the United States in 1861 and who had been honorably discharged, was entitled to preference under section 10½ of the act of 1897, as the section of the act was unconstitutional. It may be true that the civil service commission erred in its ruling on the hearing, but that is a question which cannot be inquired into by writ of certiorari. The civil service commission had jurisdiction and it proceeded according to the forms of law, and if that tribunal made a mistake in holding that the act of the Legislature was valid, and the facts presented brought Aaron L. Brown within the terms of the act which entitled him to a preference over the petitioner, the ruling of the tribunal was mere error, which cannot be reviewed in this proceeding.

We think the judgment of the court quashing the writ was correct, and it will be affirmed.

Judgment affirmed.<sup>16</sup>

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### ' POWELL v. BULLIS.

Supreme Court of Illinois, 1906. 221 Ill. 379, 77 N. E. 575.

Certiorari to review the action of the civil service commission of Chicago in removing Bullis as a patrolman from the police force.

HAND, J.<sup>17</sup> \* \* \* The main reason urged by appellee as grounds for sustaining the judgment of the lower courts is that the record filed as a return to the writ does not show that Bullis was notified of the time and place fixed by the civil service commission for a hearing upon the charges preferred against him, or that he waived notice of the time and place of hearing by appearing before said police trial board or otherwise. Section 12 of the civil service act (*Hurd's Rev. St. 1903*, c. 24, § 457) provides: "No officer or employé in the classified civil service \* \* \* shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense." And section 1 of rule

<sup>16</sup> See, also, *Kammann v. Chicago*, 222 Ill. 63, 78 N. E. 16 (1906).

<sup>17</sup> The court first holds that the writ may be issued where personal rights are involved as well as where property rights are involved.



8 of the civil service commission provides: "The commission shall cause notice in writing to be personally served on the accused, or to be mailed to him at his own address, as shown by the records of the commission, stating the time (which shall not be less than five days after the service or mailing of such notice) and place when and where such charges will be investigated, and shall give the accused an opportunity to be heard in his own defense at such investigation."

The giving or waiver of such notice was clearly jurisdictional (*Commissioners of Highways v. Smith*, 217 Ill. 250, 75 N. E. 396), and as the court could only determine that question from an examination of the record filed as a return to the writ (*Joyce v. City of Chicago*, supra [216 Ill. 471, 75 N. E. 184]), and the record failed to show that Bullis had been notified or waived notice of the time and place of his hearing upon the charges preferred against him, we think the police trial board was without power to hear the charges made against him or the civil service commission to approve the same and order him discharged as a patrolman from the police force of the city of Chicago, and that the trial court properly quashed the proceedings of the commission.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.<sup>18</sup>

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### FUNKHOUSER v. COFFIN et al.

Supreme Court of Illinois, 1921. 301 Ill. 257, 133 N. E. 649.

CARTER, J. An order was entered in the circuit court of Cook county quashing the writ of certiorari to bring up the record of the proceedings of the civil service commission of the city of Chicago showing the removal of appellee from the position of second deputy superintendent in the police department of said city, which he held under the Civil Service Law. An appeal was taken to the Appellate Court for the First District, where the judgment of the circuit court was reversed and the cause remanded, with directions to quash the proceedings. The Appellate Court thereupon allowed a certificate of importance, and certified the cause to this court for further hearing, and this appeal followed. \* \* \*

Section 12 of the Civil Service Act, controlling on this hearing as to the removal of appellee, forbids the exercise of the power of removal in such a case "except for cause, upon written charges, and after an opportunity to be heard." Hurd's Stat. 1917, p. 634. The common-law writ of certiorari lies from a superior to an inferior court or inferior tribunal "and its purpose is to have the entire record of the inferior body brought before the court, that it may be inspected, to determine whether it had jurisdiction, or had exceeded its jurisdiction, or had

<sup>18</sup> Accord: *Lantz v. Hightstown*, 46 N. J. Law, 102 (1884); *Common Council of Oshkosh v. State*, 59 Wis. 425, 18 N. W. 324 (1884).

failed to proceed according to the essential requirements of the law, where no appeal or other direct means of reviewing the proceeding is given. [Citing authorities.] It does not require a return of the evidence or a certificate of facts outside of the record. On the return of the record to the court issuing the writ, the trial is had on the record, it being contrary to the practice to form any issue of fact, or to hear or consider evidence in relation to the original proceeding as heard on that trial. If the circuit court, on the return to the writ, finds from the record that the inferior tribunal had jurisdiction, and had not exceeded it, and had proceeded according to law, the writ will be quashed; but, on the contrary, if the court finds the inferior body had no jurisdiction, or had exceeded it, or had not proceeded according to law, it will quash the judgment and proceedings shown by the return." *Donahue v. County of Will*, 100 Ill. 94.

The only office which this writ performs is to certify the record of a proceeding from an inferior to a superior tribunal. The superior tribunal, upon an inspection of the record alone, when the return is sufficient, "determines whether the inferior tribunal had jurisdiction of the parties and of the subject-matter, and whether it has exceeded its jurisdiction, or has otherwise proceeded in violation of law. \* \* \* The record must show facts giving the inferior tribunal jurisdiction, and mere conclusions of law are not sufficient." *Hahnemann Hospital v. Industrial Board*, 282 Ill. 316, 118 N. E. 767.

There is no presumption of jurisdiction in favor of a body exercising a limited or statutory jurisdiction. Nothing is taken by intendment in favor of such jurisdiction, but the facts upon which the jurisdiction is founded must appear in the record. Appellee has a right to a judicial review of the proceedings, "and the record must show that the board acted upon evidence, and contain the testimony upon which the decision was based, in order that the court may determine whether there was any evidence fairly tending to sustain the order." *Tazewell Coal Co. v. Industrial Com.*, 287 Ill. 465, 123 N. E. 28; *Glos v. Woodard*, 202 Ill. 480, 67 N. E. 3.

The finding of the commission in removing the appellee from his position stated no evidence or any facts justifying his removal, simply saying on this point: "Whereupon the commission heard the evidence offered, and, having considered all the evidence adduced herein, we find therefrom that the said M. L. C. Funkhouser is guilty as charged in the within and foregoing charges."

It is manifest that the finding that the appellee was guilty as charged is a mere conclusion of law. No fact was stated by which the court was able to see that that conclusion was true. "A quasi judicial tribunal of inferior jurisdiction must recite the facts, or preserve the facts themselves, upon which its jurisdiction depends." *Troxell v. Dick*, 216 Ill. 98, 74 N. E. 694. "But the recital that due notice was given is not sufficient in a case of this kind. \* \* \* Such recital is a mere conclusion of law. Facts must be stated from which the court is able to

see that this conclusion is true." *Highway Com'rs v. Smith*, 217 Ill. 250, 75 N. E. 396.

When the proceedings that are being heard are summary, without the right of trial by jury, and there is no right of appeal, "it is necessary that for purposes of review the substance of the evidence should be given, and not the conclusions drawn therefrom." *Sawicki v. Keron*, 79 N. J. Law, 382, 75 A. 477.

Where a statute provides that an officer may be removed, but only for cause and after an opportunity to be heard, the power thus granted is not an arbitrary one, to be exercised at pleasure, but only upon just and reasonable grounds, and then not until after notice to the person charged, for in no other way can he have an opportunity to be heard. *Throop on Public Officers*, § 379. The same rule is laid down by this court in *Blunt v. Shepardson*, 286 Ill. 84, 121 N. E. 263, and authorities cited. In a summary ex parte case, where the proceedings are in derogation of the common law, it has been uniformly held that they must be in strict accordance with the provisions of the law by which they are authorized.

"The judgment must recite all the facts that are necessary in order to give the court jurisdiction in the case, and to authorize the court to pronounce judgment. The recital in this judgment is too vague. It is stated that Garner had been appointed, and was clerk, when the judgment was pronounced, in July, 1833. But it does not necessarily follow that he was clerk during the year 1832, the period for which he is rendered liable. That he held the office during the time for which he is charged as a defaulter nowhere appears. All the facts stated in the record might be true, consistently with the supposition that Garner was not appointed clerk until January, 1833." *Garner v. Carroll*, 15 Tenn. 365.

And this seems to be the uniform rule in passing upon the common-law writ of certiorari in the superior court in practically every jurisdiction. See *Keenan v. Goodwin*, 17 R. I. 649, 24 A. 148; *People v. Campbell*, 82 N. Y. 247; *State v. Whitford*, 54 Wis. 150, 11 N. W. 424; *Andrews v. King*, 77 Me. 224; 2 *Dillon on Mun. Corp.* (5th Ed.) § 484; *Gilbert v. Board of Police and Fire Com'rs*, 11 Utah, 378, 40 P. 264.

Counsel for the civil service commissioners argue that the decisions of this court in *Hahnemann Hospital v. Industrial Board*, *supra*, and *Tazewell Coal Co. v. Industrial Com.*, *supra*, were under a special statute which required the evidence to be preserved, and that therefore those authorities on this question are not in point. We cannot so hold. It is clear that in the *Hahnemann Hospital Case* the court was not laying down the rule simply because that statute required the evidence to be preserved, but in accordance with the general rule governing the common-law writ of certiorari, for it cites the general doctrine as to this writ laid down in 4 *Ency. of Pl. & Pr.* 262, 11 *Corpus Juris*, 205, and 5 *R. C. L.* 265; and the rule laid down by these authorities was ap-



plied to the common-law writ of certiorari whether or not a special statute applied as to the preservation of the evidence in the record, such as required by the Workman's Compensation Act. The holdings of this court are that the return to a common-law writ of certiorari must show by affirmative evidence the jurisdiction of the tribunal passing upon a case removing a person from office, and must show by the facts recited that the tribunal so acting had jurisdiction and authority so to do.

In 5 Ruling Case Law, p. 265, which is cited with approval in the Hahnemann Hospital Case, it is stated: "Where the jurisdictional facts do not appear of record the lower court must certify not only what is technically denominated the record, but such facts, or the evidence of them, as may be necessary to determine whatever question as to the jurisdiction of the tribunal may be involved."

The record before us does not disclose in any way any facts constituting a cause for the removal of appellee from his position as a member of the police force of Chicago, and it cannot be told from an inspection of the record that any such facts existed, the only statement in the record being that the evidence was heard and appellee was found guilty as charged. Under all the authorities cited, the words "as charged" must be held to be a mere conclusion of law, and not a recital of the facts. Even though it be conceded that the specifications filed against appellee might constitute legal cause for removal, there is nothing in the return made to this writ from which this court can see that there was any attempt to prove any of the facts or what was the particular state of facts upon which he was found guilty.

It is true, as urged by counsel for the civil service commissioners, that the courts have no power to inquire into the discretion exercised by the commission, provided it acted within its power. *People v. City of Chicago*, 234 Ill. 416, 84 N. E. 1044, and authorities there cited. A very wide latitude is necessarily granted to the commission in the exercise of discretion in matters of this kind, but, as the authorities cited hold:

The "inferior tribunals that have power to proceed only when certain jurisdictional facts are established must judge for themselves according to their best discretion, whether such facts exist. But it does not by any means make their action a case of discretion not to be controlled. \* \* \* Their judgment as to what the law has allowed them to determine will be controlled otherwise they may assume unlimited powers." *State v. Common Council*, 9 Wis. 254.

That such inferior tribunals do not possess unlimited and uncontrolled jurisdiction in the exercise of their powers, and cannot act arbitrarily in such exercise, is laid down by this court and the great weight of authorities in other jurisdictions. See, in connection with the other authorities cited, *People v. Phillips*, 1 Edm. Sel. Cas. (N. Y.) 386, and *Blunt v. Shepardson*, *supra*.

The record made on the return of the writ failing to show any facts upon which removal was justified, the trial court erred in quashing the

writ and in not granting the motion of the appellee to quash the original proceedings. Therefore the judgment of the Appellate Court reversing the judgment of the circuit court and remanding the cause, with directions to quash the proceedings, will be affirmed.

Judgment affirmed.<sup>19</sup>

<sup>19</sup> The following additional cases in this collection are cases of certiorari: *Hartman v. Wilmington*, 1 Marvel (Del.) 215, 41 A. 74 (1894); *Queen v. Bowman*, [1898] 1 Q. B. 663; *Van Nortwick v. Bennett*, 62 N. J. Law, 151, 40 A. 689 (1898); *People ex rel. Copcutt v. Board of Health of Yonkers*, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522 (1893); *People ex rel. Shuster v. Humphrey*, 156 N. Y. 231, 50 N. E. 860 (1898); *Tomlinson v. State Board of Equalization*, 88 Tenn. 1, 12 S. W. 414, 6 L. R. A. 207 (1889); *Joyce v. Chicago*, 216 Ill. 466, 75 N. E. 184 (1905); *Queen v. Wood*, 5 El. & Bl. 49 (1855); *Reg. v. Wheatley*, 16 Q. B. Div. 34 (1885); *Reg. v. Horrocks*, 64 J. P. 661 (1900); *Lloyd v. Ramsay*, 192 Iowa, 103, 183 N. W. 333 (1921); *Rex v. Local Government Board*, [1914] 1 K. B. 160; *Blunt v. Shepardson*, 286 Ill. 84, 121 N. E. 263 (1918).

See, also, section 55, *infra*.

FR.ADM.LAW (2D ED.)—33

## CHAPTER 10

### OTHER EXTRAORDINARY LEGAL REMEDIES

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#### SECTION 41.—QUO WARRANTO<sup>1</sup>

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##### STATE v. EVANS.

Supreme Court of Arkansas, 1841. 3 Ark. 585, 36 Am. Dec. 468.

RINGO, C. J., delivered the opinion of the court.

The pleadings, although they are in some respects rather uncertain and informal, are believed to be substantially good, if the facts disclosed are such as in law authorize the writ, or enable the state to require the defendant to show his warrant or authority to preside upon the trial of and adjudicate the cases therein mentioned.

The first question, therefore, to be determined, is whether the action or legal remedy for the wrong supposed to have been committed, has not been misconceived. It must, we think, be conceded that the common law regards the proceeding by writ of quo warranto as the most appropriate remedy for the king, by which he may at pleasure require any subject, exercising a public franchise or authority which he cannot legally exercise without some grant or authority from the crown, to show by what warrant or authority he exercises it, and thereupon demand and have a judicial trial and determination of the legal right of the defendant to exercise such office or franchise, and that, by analogy, the state here may in like cases have the same remedy. But here, as in England, the object and effect of the proceeding must be either to oust the party defendant of the franchise, if he fails to show in himself a complete legal right to its exercise, derived from or under the authority of the state, or, if the franchise has been once legally granted, and has been forfeited by the defendant or those through whom he derives title to it, to seize it into the hands of the state. But it is believed that no precedent can be found where this writ was ever issued for the purpose of restricting or preventing any one legally possessed of a public office or fran-

<sup>1</sup> The remedy of quo warranto (in the modern practice, in the form of an information in the nature of a quo warranto) is not generally available for the protection of private rights against administrative action. Its principal uses are the correction of the illegal exercise of corporate powers and the determination of controversies regarding the title to public office. As to its history and use for these purposes, see *Attorney General v. Sullivan*, 163 Mass. 446, 40 N. E. 843, 28 L. R. A. 455 (1895).



chise from exercising any right, authority, or privilege incident thereto, or claimed by virtue thereof. It is a legal proceeding, authorized exclusively for the purpose of investigating and determining, by judicial authority, the legal right to a public office or franchise, but is not nor ever was authorized by the common law to be used as the legal instrument or means of prohibiting or restraining a public officer, or person exercising a public franchise from the doing of any particular act or thing, the right of doing which was claimed by virtue of such office or franchise, and constituted a portion only or an integral part of the rights, powers, and privileges incident thereto.

For example, although it is the appropriate legal proceeding to oust or remove from office, by judicial authority, a person who is ineligible to the office of judge of the circuit court, or who has not been legally elected, appointed, commissioned, or qualified to hold such office, yet if the office be held by a person eligible thereto, who has been legally elected, or appointed, commissioned, and qualified to hold it, he cannot by such proceeding be legally prohibited or prevented from taking cognizance of and adjudicating any suit or proceeding instituted and pending for adjudication in any court which he is by law authorized to hold, although such court may not legally possess jurisdiction of the matter, or authority to adjudicate and determine the controversy. So, if the commission be special, to hold plea of and adjudicate and determine certain cases particularly mentioned and described, a portion only of which he can legally adjudicate and determine, and he assumes jurisdiction over all of the cases so mentioned and described, notwithstanding the want of legal authority in him to adjudicate and determine a part of them, he cannot be legally restrained or prohibited therefrom as to the cases only which he has no legal right to take cognizance of, try, and decide, by any proceeding upon a writ of quo warranto; because the object and effect of the proceeding in such case would not be to oust or divest him of the office itself, but only to prohibit him from exercising a power incident to the office in regard to a particular case, thus conceding to the defendant the legal title to the office, and denying only his legal right to exercise it over a particular case, or in reference to some particular matter or subject, which is not and never was the legitimate office or object of such writ, or the proceedings thereupon authorized by law.

The defendant shows that the judge of the Fifth judicial circuit, embracing the county of Pulaski, had officially certified to the Governor the fact of his disqualification to preside on the trial of sundry cases then pending in the circuit court of said county, which were specially designated, and among which were the cases mentioned in the writ, and that the Governor thereupon appointed and commissioned specially the defendant for the trial and determination of the cases so certified, which were also specially enumerated in his commission, including with others the cases mentioned in the writ; and

these facts are not controverted by the state, but are, by her replication, admitted to be true. The defendant therefore, from aught that appears in the pleadings before us, is eligible to and legally possessed of the office of judge of the circuit court, and notwithstanding his office and authority are limited to the trial and determination of the cases specified in his commission, he was unquestionably invested with legal authority to hold the circuit court in which such cases were pending, for their trial and determination, and in reference thereto was clothed with all the powers appertaining to said court, and was by law to preside therein pending their trial and determination, unless prevented by some legal remedy applicable to the case, and interposed, prosecuted, or presented by the parties themselves, instead of the state, if in fact he had no legal jurisdiction of, or right to try and determine, a portion only of the cases mentioned in his commission.

The writ before us does not require the defendant to show by what warrant he exercises the office or franchise of judge of the circuit court in and for the county of Pulaski, but simply demands of him to show by what authority he exercises said office in respect to the two cases therein mentioned, being a part only of the cases he was commissioned specially to try. Nor does the replication question his legal right to the office itself, but simply denies the disqualification of the regular judge of the Fifth judicial circuit to adjudicate the cases mentioned in the writ, thus attempting, as it were, to divide the office, and to consider it as a distinct office depending upon a separate warrant in reference to each case, which the judge is commissioned specially to try and determine, contrary to the fact, as well as every principle of law and justice. This principle, if admitted to be true, might subject the officer to the vexation and expense of exhibiting his authority in every case pending for his adjudication, and a judgment in one case would be no bar to the demand made of him in another, nor could any judgment of ouster from office, or other legal judgment, that we are aware of, be pronounced against him in such case.

And therefore we are of the opinion that the legal remedy for the wrong, if any has been committed by the supposed unauthorized and illegal certification to the Governor, by the regular judge of the circuit court of Pulaski county, of the cases mentioned in the writ, has in this proceeding against the defendant been misconceived. And for this reason the demurrer to the replication must be sustained.<sup>2</sup>

<sup>2</sup> Quo warranto held not to be the proper remedy to test the validity of an ordinance. *State v. Lyons*, 31 Iowa, 432 (1871); *State v. Newark*, 57 Ohio St. 430, 49 N. E. 407 (1898).

## PEOPLE ex rel. LONGRESS v. BOARD OF EDUCATION OF CITY OF QUINCY.

Supreme Court of Illinois, 1882. 101 Ill. 308, 40 Am. Rep. 196.

Mr. Chief Justice CRAIG delivered the opinion of the court.

This was an information in the nature of a quo warranto, brought by the Attorney General, on the relation of John Longress, against the board of education of the city of Quincy, a corporation created by an act of the General Assembly approved February 20, 1861.—Priv. Laws 1861, p. 252. The board of education is intrusted by law with the exclusive management and control of the public schools in the city of Quincy. \* \* \*

It is averred in the information that on the 31st day of July, 1878, before that time, and since, there was a large number, to wit, five hundred persons of African descent, commonly called "colored persons," between the ages of six and twenty-one years, who for all that time have been and are now bona fide residents of said city of Quincy, and in the several school districts thereof, and have been and are at all times, and are now, ready to furnish to the principal of the proper school satisfactory evidence that they have been vaccinated; and the said persons do now reside, and at all times heretofore have in good faith resided, in the different school districts of said city so established by the said the board of education of the city of Quincy, and are entitled to be admitted into the public schools of the districts in which they respectively reside, without being directly or indirectly excluded therefrom on account of their descent or color, yet the said the board of education of the city of Quincy, during all the time aforesaid, without warrant or authority of law, have adopted, maintained and enforced, for the management of the public schools of said city, and to exclude the said persons of African descent, commonly called "colored persons," from the said public schools in the districts in which they reside, on account of their descent and color, the following pretended rules and regulations for the government and management of the public schools of said city, that is to say: "That the colored schools of said city shall be composed of colored pupils who shall be of the prescribed age, and bona fide residents of said city; that no pupil of African descent shall be permitted to attend any of the public schools of the city other than the colored schools, and that all the colored pupils in said city shall attend a certain public school in said city, called the Lincoln School, and no other." All of which pretended rules and regulations for the government and management of said public schools in said city, the said the board of education of the said city of Quincy, without authority of law, do maintain and enforce, to the damage of the people of the state of Illinois, and against the peace and dignity of the same.



The board of education filed five pleas to the information, to which the Attorney General interposed a demurrer, which the court carried back and sustained to the information, and this decision of the court is assigned for error.

Whether a proceeding in the nature of a quo warranto, instituted by the Attorney General, will lie in a case of this character at common law, is a question which it will not be necessary to determine. The object of the proceeding was to test the legality of the rules adopted by the board of education, and if the statute is broad enough to authorize the court to inquire into the action of the board in adopting and enforcing the rules which excluded children of color from the public schools, then the information was proper, and the court erred in sustaining the demurrer.

Section 1, c. 112, p. 787, Rev. St. 1874, provides "that in case any person shall usurp, intrude into, or unlawfully hold or execute any office or franchise, \* \* \* or any corporation does or omits any act which amounts to a surrender, or forfeiture of its rights and privileges as a corporation, or exercises powers not conferred by law, \* \* \* the Attorney General, or state's attorney of the proper county, either of his own accord or at the instance of any individual relator, may present a petition to any court of record of competent jurisdiction, or any judge thereof, in vacation, for leave to file an information in the nature of a quo warranto, \* \* \* and if such court or judge shall be satisfied that there is probable ground for the proceeding, the court or judge may grant the petition," etc.

The board of education is a corporation created by law, clothed with the exercise of certain powers in relation to the public schools of Quincy. Now, if the board, in the discharge of its duties as a corporation, exercises powers not conferred by law, it is apparent that it will fall within the obvious meaning of the statute, unless the plain reading of the statute is to be disregarded. The very gist of the complaint here is that the board of education, a corporation, is exercising powers not conferred by law, unless it had the right to adopt and enforce the rules set out in the information. We are therefore clearly of opinion that, under the statute, the Attorney General had the right to file the information. \* \* \* 3

<sup>3</sup> See, also, *People v. Town of Thornton*, 186 Ill. 162, 57 N. E. 841 (1900).

In Illinois, formerly, quo warranto was held not to be the proper remedy to test the validity of the extension of the powers of a municipal corporation over new territory. *People v. Whitcomb*, 55 Ill. 172 (1870). At present, quo warranto is held to be the proper remedy for that purpose. *Evans v. Lewis*, 121 Ill. 478, 13 N. E. 246 (1887); *Shanley v. People*, 225 Ill. 579, 80 N. E. 277 (1907).

In Kansas, quo warranto was used to oust a municipal corporation from the illegal exercise of the power to grant licenses for the sale of intoxicating liquor. *State v. Topeka*, 30 Kan. 653, 2 Pac. 287 (1883); *Id.*, 31 Kan. 452, 2 Pac. 593 (1884).

See, also, *State v. City Council of Charleston*, 1 Mill. Const. (S. C.) 36 (1817).

With regard to the burden of proof in quo warranto proceedings, see note to *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265, 268 (1869).

PEOPLE *ex rel.* DEMAREST *v.* FAIRCHILD, Atty. Gen.

Court of Appeals of New York, 1876. 67 N. Y. 334.

Appeal from order of the General Term of the Supreme Court in the Third Judicial Department, affirming an order of Special Term, which denied a motion for a writ of peremptory mandamus. Reported below, 8 Hun, 334.

The relators alleged that they were duly elected aldermen and assistant aldermen of the city of New York, pursuant to the city charter, and took the oath of office; that the boards of aldermen and assistant aldermen duly organized as such, but that the mayor refused to recognize them; that the act (chapter 335, Laws 1873) abolishing the board of assistant aldermen and establishing what is termed the minority system of electing the board of aldermen was unconstitutional; that Samuel Lewis and others, claiming to have been elected aldermen under said act, organized themselves as a board of aldermen, were recognized by the mayor, and are pretending to discharge the duties of the office; and that the Attorney General has refused to bring an action to determine the title to the office. The motion was for a writ of mandamus requiring him to commence and prosecute such an action.

ALLEN, J. The language of the statute authorizing actions in the nature of a quo warranto to try the title to office is very guarded, and does not give the action as of right to every individual who may think that an office to which he has been legally chosen or appointed has been usurped by another, or who may volunteer to become an informer. It says the action "may be brought by the Attorney General" upon his own information or upon the complaint of any private party. Code, § 432. Prior to the Revised Statutes leave of the Supreme Court was required for the institution of proceedings of this character. 1 Rev. Laws, 108, § 4. Under that system, the court in this state exercised a sound discretion in granting or withholding leave to file an information in the nature of a quo warranto. *People v. Sweeting*, 2 Johns. 184. A like discretion was exercised by the courts in England under similar statutes. *Rex v. Sargent*, 5 T. R. 467. By the Revised Statutes, the necessity of an application to the court was dispensed with and the discretion before then vested in the court was transferred to and vested in the Attorney General, whose province it was at the common law to determine whether a case had arisen in which the public interests required the proceedings to be instituted. 2 Rev. St. 581, § 28; Rev. Notes, 5 Stat. 516.

The primary object of the action is to protect the public against the usurpation of office without legal authority, and the determination of the right of another to the same office is merely an incident to the action, and is permitted for the reason that ordinarily the judicial ouster of the incumbent in effect establishes the right of the

adverse claimant to the office, and if the Attorney General brings an action to eject an alleged usurper from an office, he may be compelled to join with the people, as plaintiff, the name of the person on whose relation the action is brought. Code, § 434. He has a discretion whether he will bring the action, but not as to the proper parties if an action is brought. It is evident that the Legislature used the words "may" and "shall" intelligently and with a purpose, and that no positive duty is imposed upon the Attorney General to bring an action upon request of a party claiming office from which he is expelled. The statute does not give the individual claiming the office or any other person the legal right to compel an action to be brought by the law officer of the state, or to bring an action in the name of the people. The control over the action and the right to bring it is with the Attorney General, and the courts cannot sit in judgment upon the exercise of his discretion or coerce his action. The language of the act is very circumspect and precludes the idea that the Legislature intended to subject the action of the Attorney General in a matter thus affecting the public interest to the dictation of individual interests or to judicial reviews. Judge Harris, in a well-considered opinion (reported as *People v. Attorney General*, 22 Barb. 114), shows that a mandamus will not lie to compel the Attorney General to commence an action in the nature of a quo warranto at the instance of a claimant of the office in dispute.

The counsel for the relators concedes that the doctrine that the right to decide whether a quo warranto should issue is vested in the Attorney General may be sound when two officers claim under the same system conceded to be constitutional, but contends that inasmuch as the relators do not claim the seats of the intruders, but for a restoration of what they claim to be the constitutional government of New York City, and that they are entitled to distinct offices under the form of government attempted to be abrogated, the determination of that official is not final, but their right to his intervention by action is absolute. It would seem that in this view any citizen would have an equal right with the relators to inaugurate an action to test the constitutionality of the law under which the city officials hold office. The constitutionality of the law can be tested when the question properly arises in an action in which it becomes material, but the Attorney General cannot be compelled to bring an action merely for the settlement of that question. But the right of the relators is not affected by the questions of law or of fact upon which they propose to test the right of the incumbents to their offices, and the case is not distinguished favorably to the relators from *People v. Attorney General*, supra. The Attorney General may have erred in judgment, and for this there is no remedy. If he has acted corruptly or from unworthy motives, and the legal rights of the relator have been prejudiced, this is not an appropriate remedy.

The order must be affirmed. All concur.

Order affirmed.



## PEOPLE ex rel. RASTER v. HEALY, State's Atty.

Supreme Court of Illinois, 1907. 230 Ill. 280, 82 N. E. 599, 15 L. R. A. [N. S.] 603.

Appeal from Circuit Court, Cook County.

Mandamus, by the People, on the relation of Edwin O. Raster, to compel John J. Healy, as State's Attorney, to sign a petition for leave to file an information in the nature of a quo warranto. From a judgment for respondent, petitioner appeals. Reversed and remanded, with directions.

SCOTT, J. This controversy involved the construction of section 1 of chapter 112 of Hurd's Revised Statutes of 1905, which reads: "That in case any person shall usurp, intrude into, or unlawfully hold or execute any office or franchise, or any office in any corporation created by authority of this state, \* \* \* the Attorney General or state's attorney of the proper county, either of his own accord or at the instance of any individual relator, may present a petition to any court of record of competent jurisdiction, or any judge thereof in vacation, for leave to file an information in the nature of a quo warranto in the name of the people of the state of Illinois, and if such court or judge shall be satisfied that there is probable ground for the proceeding, the court or judge may grant the petition, and order the information to be filed and process to issue. \* \* \*"

It is contended by the appellee that this statute vests the state's attorney of the proper county with an arbitrary discretion in reference to seeking leave to file an information in the nature of a quo warranto in the name of the people, that in the exercise of that discretion he cannot be controlled by the courts, and that he may refuse to seek the leave for any reason which to him seems sufficient or may refuse when no reason at all can be assigned for so doing; while appellant argues that in a case such as that now before us, where the proposed individual relator has a personal and private interest in the litigation which he desires to set on foot and where the interest of the public is purely or largely theoretical, the only discretion vested in the legal representative of the people is a discretion to determine whether the documents presented to him by the individual are in proper legal form, and whether the party seeking the institution of the suit presents evidence of such facts as establish his legal right to the remedy to be afforded by judgment against the respondent in the quo warranto proceeding.

Originally a proceeding of this character was by writ of quo warranto against any one who claimed or usurped any office, franchise, or liberty to inquire by what authority he supported his claim, in order to determine the right. Later the practice was changed, and an information in the nature of a writ of quo warranto succeeded the former method. 3 Blackstone's Com. 262, 263. By the common law

the proceeding in quo warranto was employed exclusively as a prerogative remedy, to punish a usurpation of franchises or liberties granted by the crown, and never as a remedy for private citizens desiring to test the title of persons claiming to exercise a public franchise or desiring to establish a private right. In England the information, as a means of investigating and determining civil rights between parties, owes its origin to St. 9 Anne, c. 20, which authorized and required the proper officer to file the information by leave of court, upon the relation of any person desirous of prosecuting the same, against any person usurping or intruding into any municipal office or franchise in the kingdom. High on Extraordinary Legal Remedies (3d Ed.) § 602. That statute, however, having been passed in the year of our Lord 1710, has never been in force in this state.

It will be observed from examination of section 1, *supra*, that the proceeding is made the vehicle for the assertion of many rights, both private and public, which could not have been vindicated by this method at the common law. As originally used, the proceeding was criminal in character, and the offender, upon conviction, was liable both to fine and imprisonment as well as ouster from the franchise or liberty which he had wrongfully usurped. Under our statute the proceeding is, in fact, a civil remedy when used for the protection of private rights, and, in the event of a judgment in favor of the defendant costs may be awarded against the relator. Chapter 112, § 6, *supra*.

By the common law, and in England prior to the passage of the statute of Anne, arbitrary discretion was lodged in the Attorney General to determine whether he would move, and that discretion could not be controlled or reviewed. *Attorney General v. Ironmongers' Co.*, 2 Beav. 314; *Attorney General v. Wright*, 3 Beav. 447; *People v. Attorney General*, 22 Barb. (N. Y.) 114; *People v. Fairchild*, 8 Hun (N. Y.) 334; *In re Gardner*, 68 N. Y. 467; *Everding v. McGinn*, 23 Or. 15, 35 Pac. 178. In extending the scope of this proceeding, the Legislature of this state has not by express words changed or altered the common law so far as the discretion vested in the Attorney General or state's attorney is concerned, but the character of the discretion possessed by these officers must be determined, to some extent, by consideration of the rights which the lawmaking power has committed to that discretion.

By the common law the information in the nature of a quo warranto was solely a prerogative remedy. No suit was ever prosecuted by that remedy at the instance of a private person or for the assertion of a private right. It was used only where a wrong had been done, or was alleged to have been done, to the king, and it was therefore the rule that only the king, or his representative, should determine whether a suit should be brought to enforce the right of the king. Where jurisdiction is given the courts to enforce the rights of private individuals by this method, it is manifest that the power to

determine whether the suit should be brought should not be lodged in the legal representative of the sovereign power, when, as here, the right of the citizen is substantial and the concern of the state with regard to the litigation is practically or entirely theoretical. In such case, the reason for the rule having failed, the rule itself should fail. This is well illustrated by cases of one class which are constantly arising in this state. These are cases where it is charged by the owner of realty that his property has been wrongfully included within a drainage district, and he has attempted to have that question determined upon an application made for a judgment and order of sale against his property for the collection of a tax or assessment imposed by the drainage authorities. In such instances this court has invariably held that he could not raise the question in that way, but that he must resort to an information in the nature of a quo warranto for the purpose of determining whether or not the corporation is engaged in exercising powers not conferred by law. *Shanley v. People*, 225 Ill. 579, 80 N. E. 277, and cases there cited.

It is manifest that it would be a mere travesty to say, as was said in the *Shanley Case*, that in such case the action of the corporate authorities "can only be reviewed in a direct proceeding by quo warranto," and then to say that whether or not application shall be made for leave to file an information in the nature of quo warranto for the purpose of reviewing the action of the commissioners rests solely in the arbitrary discretion of the legal representative of the people, who has no interest in the welfare of the proposed relator, and who may give weight to the fact that it is for the benefit of a large number of property owners who are properly within the district that he should refuse to permit the use of his name, and who may regard that as a sufficient reason for declining to act. It is against the policy of our law that the arbitrary power to determine whether the individual shall have the privilege to be heard in the courts in the assertion of his private right should be lodged in any tribunal or officer not a court or judicial officer as distinguished from a nonjudicial or quasi judicial officer.

Appellee urges that it cannot consistently be held that the state's attorney has an arbitrary discretion as to whether he will seek leave to file the information where no interest is involved save that of the public, and that he has no discretion where the interest of a private individual is concerned, for the reason that such discretion as he has is conferred upon him by the following words from the statute: "The Attorney General or state's attorney of the proper county, either of his own accord or at the instance of any individual relator, may present a petition to any court of record of competent jurisdiction"—which words apply alike to cases in the prosecution of which the people of the state alone are interested and to cases in which no substantial right is to be asserted except the right of the relator, and in which the interest of the public is purely or entirely theoretical.

It is urged that any such construction would result in holding that



the word "may," in the language last quoted, means "may" in cases where only the public interest is at stake, and means "shall" where private interests are involved; and it is said to be an anomaly to hold that the same word in the same sentence of a statute may mean one thing when applied to one class of cases and another thing when applied to another class of cases. We do not think this situation presents any serious difficulty. When the Legislature extended the right to private individuals to assert private rights by this proceeding, it is apparent that it was intended that they should have an opportunity to seek redress for their wrongs by making application to a court, or judge thereof, for leave to file an information. The duty resting upon the state's attorney to sign and present a petition for leave to file an information in the nature of a quo warranto where evidence of facts is properly presented to him by a proposed relator which shows prima facie that the relator is legally entitled to the relief, in reference to a private right, which would be afforded him by a judgment in his favor in a quo warranto proceeding, is an absolute one.

It follows, therefore, that where he declines to act for any reason other than that the facts, evidence of the existence of which is presented to him, do not warrant the relief which the proposed relator seeks, or that the petition and affidavit or affidavits presented to him are not in proper legal form, his declination is an abuse of his discretion, conceding that his construction of the statute be correct; and such an abuse of discretion as amounts to a refusal on his part to exercise his discretion at all and to a refusal to perform the duty enjoined upon him by the law. \* \* \*

Courts of last resort in our sister states have frequently found themselves confronted with the same difficulty which we are now considering, where Legislatures have extended the scope of the remedy by quo warranto to include the enforcement of private rights, but have failed to impose by express words a positive duty upon the Attorney General or state's attorney to proceed at the instance of the individual relator, or have failed to provide that the proceeding may be instituted without the co-operation of those officers. It has sometimes been held that the arbitrary discretion of the public prosecutor still exists as at common law, and that if he refuses to lend his name to the proceeding the individual relator is without remedy, even though the refusal of the officer results from political, selfish, or other improper considerations. In other states relief for the relator has been suggested by various methods, not substantially different, so far as the result to be obtained is concerned. [The opinion then cites and quotes from *Bank of Mt. Pleasant*, 5 Ohio, 250 (1831), *State v. Berry*, 3 Minn. [Gil.] 190 (1859), *State v. Deliesseline*, 1 McCord (S. C.) 52 (1821), *Lamoreaux v. Attorney General*, 89 Mich. 146, 50 N. W. 812 (1891), and *Cain v. Brown*, 111 Mich. 657, 70 N. W. 337 (1896).]

In *People v. Ridgley*, 21 Ill. 66, and in *People v. Waite*, 70 Ill. 26, it was said that our quo warranto statute was a substantial copy of

the statute of Anne. The question now before us was not considered by the court in those cases, and they are therefore not in point. The English statute just referred to provides that "it shall and may be lawful to and for" the proper officer, by leave of court, to file or "exhibit" the information (12 Pickering's Stat. at Large, 190), while our statute provides that the Attorney General or state's attorney "may present a petition" to the court, or the judge thereof, for leave to file the information. The statute of Anne does not expressly require the officer of the crown to file the application for leave, and yet *Rex v. Trelawney*, 3 Bur. 1616, and *Rex v. Wardroper*, 4 Bur. 1964, hold that under that statute the officer is without discretion in the matter, but must apply at the instance of the private relator, and that the only discretion is in the court; and in *State v. Elliott*, 13 Utah, 200, 44 Pac. 248, it was said that "except when changed by statute the rule of procedure is practically the same in this country as in England" under the statute of Anne. \* \* \*

It is, of course, true that in many cases where the individual relator has a private and personal interest in the suit which he seeks to set on foot the public also has a substantial interest therein. No injury can result to the public in such instances, however, by requiring the prosecutor to proceed, for the reason that the court, or the judge thereof, when the petition for leave to file the information is presented, is vested with a sound legal discretion to be exercised in determining whether leave to file the information should be granted, and the court or the judge thereof may, in the exercise of that discretion, fully protect the rights of the public, and may under some circumstances, where the public weal demands, refuse leave to file the information although the clear legal right of the relator is established. *McPhail v. People*, 160 Ill. 77, 43 N. E. 382, 52 Am. St. Rep. 306. The rights and interests of the public being thus fully protected by a sound legal discretion lodged in the court, or the judge thereof in vacation, it is manifest that there is no occasion for the exercise by the state's attorney or Attorney General of a discretion to be used for the same purpose and for no other purpose.

The discretion possessed by the Attorney General at the common law is no doubt now possessed by the Attorney General or state's attorney in all cases which are, in fact, prosecutions on the part of the people and which involve no individual grievance of the relator.\* One such case is where the wrong is the usurpation of an appointive public office to which, in the event of judgment of ouster, no particular individual will have a right to succeed; and another example is where the object is to secure a judgment ousting a corporation from the enjoyment of all the franchises which it exercises. In cases, however, where the proposed relator has an individual and personal right, distinct from the right, if any, of the public, which is enforceable by a proceeding in quo warranto, and where he presents to the state's attorney a proper petition for his signature with evidence of the facts

\*See *People ex rel. Miller v. Fullenwider* (1928) 329 Ill. 65, 160 N. E. 175.

necessary to establish the right, it is the duty of that officer to apply for leave to file an information in the nature of a quo warranto, and, if he refuses when the matter is properly presented to him, he may be compelled by mandamus to sign and file the petition for leave.

The practice which may be followed by one who desires to become relator is to present to the state's attorney a petition addressed to the court, or to the judge thereof in vacation, for leave to file an information in the nature of a quo warranto, which petition should be so drawn as to be ready for filing when the signature of the state's attorney is thereto attached. As was suggested in *Cain v. Brown*, *supra*, the affidavit or affidavits accompanying the petition must be full and positive and must be made by a person or persons knowing the facts, and be drawn in such manner as that perjury may be assigned thereon if any material allegation contained therein is false. The affidavit or affidavits accompanying the petition, after being inspected by the state's attorney, should, in case he sign the petition, be presented with it for consideration by the court, or judge thereof, in determining whether to grant the leave asked. The practice pursued by the state's attorney in this case is not a proper one. Upon the petition being presented to him, he caused the actual parties to the controversy, by their attorneys, to appear before him, and heard them on the proposition as to whether he should sign and file the petition. This practice has, we understand, been long pursued in certain counties of this state, and we have no doubt that the public prosecutor of Cook, in this particular instance, proceeded as he did believing in good faith that this practice was the correct one. In our judgment the law of this state does not authorize him in any case to conduct a hearing of this character, and he should not have considered the views of the respondent named in the petition or those of his attorneys. \* \* \* 4

4 See *People ex rel. Post v. Healy*, 231 Ill. 629, 83 N. E. 453 (1908): "Two questions are involved in this case, both of which must be decided in order to determine whether the superior court erred in sustaining the demurrer and dismissing the petition. The first question is whether the appellee, as state's attorney, is possessed of an arbitrary and uncontrolled discretion to file or refuse to file a petition for leave to file an information in the nature of a quo warranto upon the application of an individual having a personal right enforceable by that proceeding; and the second is whether the mayor of the city of Chicago has power to remove from office members of the board of education. If a state's attorney has such discretion, he cannot be coerced by the writ of mandamus; and if the mayor has such power, the writ in this case would not be awarded, for the reason that the object sought would be unattainable and the writ useless. The first question was answered in the case of *People ex rel. v. Healy*, 230 Ill. 280, 82 N. E. 599, 15 L. R. A. (N. S.) 603. In the consideration and decision of that case we had the valuable aid of the exhaustive briefs and arguments of the counsel in this case, both printed and oral. We gave full consideration, at that time, to every authority and argument presented in this case, and we cannot add anything to that decision by a restatement here of the reasons on which it was based. It was there held that in all cases which are, in fact, prosecutions on the part of the people, involving no personal or individual right, the state's attorney is vested with the same discretion originally exercised by him at the common law, when an information in the nature of a quo warranto was solely a prerogative remedy of the crown; but under our stat-



## SECTION 42.—HABEAS CORPUS

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Ex parte WATKINS.

Supreme Court of the United States, 1830. 3 Pet. 193, 7 L. Ed. 650.

MARSHALL, C. J. This is a petition for a writ of habeas corpus to bring the body of Tobias Watkins before this court, for the purpose of inquiring into the legality of his confinement in jail. The petition states that he is detained in prison, by virtue of a judgment of the Circuit Court of the United States for the county of Washington, in the District of Columbia, rendered in a criminal prosecution carried on against him in that court. A copy of the indictment and judgment is annexed to the petition, and the motion is founded on the allegation that the indictment charges no offense for which the prisoner was punishable in that court, or of which that court could take cognizance, and consequently that the proceedings are coram non judice, and totally void.

This application is made to a court which has no jurisdiction in criminal cases (*United States v. More*, 3 Cranch, 169, 2 L. Ed. 397), which could not revise this judgment, could not reverse or affirm it, were the record brought up directly by writ of error. The power, however, to award writs of habeas corpus, is conferred expressly on this court by the fourteenth section of the judiciary act, and has been repeatedly exercised. No doubt exists respecting the power; the question is whether this be a case in which it ought to be exercised. The cause of imprisonment is shown as fully by the petitioner as it could appear on the return of the writ; consequently, the writ ought not to be awarded, if the court is satisfied that the prisoner would be remanded to prison.

No law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it. The term is used in the Constitution, as one which was well understood; and the judiciary act authorizes this court, and all the courts of the United States, and the judges thereof, to

ute, which has enlarged the scope of the remedy for the protection of individual rights, if an individual having a private and personal grievance for which the proceeding is the only remedy shall present a proper petition to the state's attorney, with evidence of the facts necessary to establish his right, it is the duty of such state's attorney to apply for leave to file an information, and if he refuses he may be compelled by mandamus to perform that duty."

The following additional cases in this collection illustrate the application of proceedings in the nature of quo warranto; *Dullam v. Willson*, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128 (1884); *Wilcox v. People*, 90 Ill. 186 (1878); *People ex rel. Gere v. Whitlock*, 92 N. Y. 191 (1883); *State ex rel. Meader v. Sullivan*, 58 Ohio St. 504, 51 N. E. 48, 65 Am. St. Rep. 781 (1898).

issue the writ "for the purpose of inquiring into the cause of commitment." This general reference to a power which we are required to exercise, without any precise definition of that power, imposes on us the necessity of making some inquiries into its use, according to that law which is in a considerable degree incorporated into our own.

The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment. The English judges, being originally under the influence of the crown, neglected to issue this writ, where the government entertained suspicions which could not be sustained by evidence; and the writ, when issued, was sometimes disregarded or evaded, and great individual oppression was suffered, in consequence of delays in bringing prisoners to trial. To remedy this evil, the celebrated habeas corpus act of 31 Car. II was enacted, for the purpose of securing the benefits for which the writ was given. This statute may be referred to as describing the cases in which relief is, in England, afforded by this writ to a person detained in custody. It enforces the common law. This statute excepts, from those who are entitled to its benefit, persons committed for felony or treason, plainly expressed in the warrant, as well as persons convicted or in execution. The exception of persons convicted applies particularly to the application now under consideration. The petitioner is detained in prison by virtue of the judgment of a court, which court possesses general and final jurisdiction in criminal cases. Can this judgment be re-examined upon a writ of habeas corpus?

This writ is, as has been said, in the nature of a writ of error, which brings up the body of the prisoner, with the cause of commitment. The court can undoubtedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction, especially a judgment withdrawn by law from the revision of this court, is not that judgment in itself sufficient cause? Can the court, upon this writ, look beyond the judgment, and re-examine the charges on which it was rendered? A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court, as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it. \* \* \*

## CHIN YOW v. UNITED STATES.

Supreme Court of the United States, 1908. 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369.

Appeal from the District Court of the United States for the Northern District of California to review an order denying the petition for a writ of habeas corpus in behalf of a Chinese person in the custody of a steamship company for deportation. Reversed with directions to issue the writ.

Mr. Justice HOLMES delivered the opinion of the court.

This is a petition for habeas corpus by a Chinese person, alleging that he is detained unlawfully by the general manager of the Pacific Mail Steamship Company on the ground that he is not entitled to enter the United States. The petition alleges that the petitioner is a resident and citizen of the United States, born in San Francisco of parents domiciled there, but it discloses that the commissioner of immigration at the port of San Francisco, after a hearing, denied his right to land, and that the Department of Commerce and Labor affirmed the decision on appeal. The petitioner thereupon was placed in custody of the steamship company to be sent to China. So far the case is within *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, and the petition was dismissed for want of jurisdiction (presumably on the ground of that decision), as sufficiently appears from the record, the reasons assigned for the appeal, and the order allowing the same.

But the petition further alleges that the petitioner was prevented by the officials of the commissioner from obtaining testimony, including that of named witnesses, and that had he been given a proper opportunity he could have produced overwhelming evidence that he was born in the United States and remained there until 1904, when he departed to China on a temporary visit. We do not scrutinize the allegations as if they were contained in a criminal indictment before the court upon a special demurrer, but without further detail read them as importing that the petitioner arbitrarily was denied such a hearing, and such an opportunity to prove his right to enter the country, as the statute meant that he should have. The question is whether he is entitled to a writ of habeas corpus on such a case as that.

Of course, if the writ is granted, the first issue to be tried is the truth of the allegations last mentioned. If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts opens the merits of the case, whether those facts are proved or not. And, by way of caution, we may add that jurisdiction would not be established simply by proving that the com-



missioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced. But, supposing that it could be shown to the satisfaction of the district judge that the petitioner had been allowed nothing but the semblance of a hearing, as we assume to be alleged, the question is, we repeat, whether habeas corpus may not be used to give the petitioner the hearing that he has been denied.

The statutes purport to exclude aliens only. They create or recognize, for present purposes it does not matter which, the right of citizens outside the jurisdiction to return to the United States. If one alleging himself to be a citizen is not allowed a chance to establish his right in the mode provided by those statutes, although that mode is intended to be exclusive, the statutes cannot be taken to require him to be turned back without more. The decision of the department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form. As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegation, on the one side, and the conclusiveness of the commissioner's fiat, on the other, when one or the other must give way, the latter must yield. In such a case something must be done, and it naturally falls to be done by the courts. In order to decide what, we must analyze a little.

If we regard the petitioner, as in *Ju Toy's Case* it was said that he should be regarded, as if he had been stopped and kept at the limit of our jurisdiction (198 U. S. 263, 25 Sup. Ct. 644, 49 L. Ed. 1044), still it would be difficult to say that he was not imprisoned, theoretically as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to China. The case would not be that of a person simply prevented from going in one direction that he desired and had a right to take, all others being left open to him, a case in which the judges were not unanimous in *Bird v. Jones*, 7 Q. B. 742. But we need not speculate upon niceties. It is true that the petitioner gains no additional right of entrance by being allowed to pass the frontier in custody for the determination of his case. But, on the question whether he is wrongly imprisoned, we must look at the actual facts. De facto he is locked up until carried out of the country against his will.

The petitioner then is imprisoned for deportation without the process of law to which he is given a right. Habeas corpus is the usual remedy for unlawful imprisonment. But, on the other hand, as yet the petitioner has not established his right to enter the country. He is imprisoned only to prevent his entry, and an unconditional release would make the entry complete without the requisite proof. The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner proves his citizenship, a longer restraint would be illegal. If he fails, the order of deportation would remain in force.

We recur in closing to the caution stated at the beginning, and add that, while it is not likely, it is possible, that the officials misinterpreted rule 6 as restricting the right to obtain witnesses which the petitioner desired to produce, or rule 7, commented on in *United States v. Sing Tuck*, 194 U. S. 161, 169, 170, 24 Sup. Ct. 621, 48 L. Ed. 917, 921, as giving them some control or choice as to the witnesses to be heard. But, unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong.

Order reversed. Writ of habeas corpus to issue.

Mr. Justice BREWER concurs in the result.

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TOD, Commissioner of Immigration, v. WALDMAN et al.

Supreme Court of the United States, 1924. 266 U. S. 113, 45 S. Ct. 85, 69 L. Ed. 195.

This is a certiorari to a judgment of the Circuit Court of Appeals for the Second Circuit (289 F. 761), discharging Mrs. Szejwa Waldman and her three minor children as relators in a writ of habeas corpus. The writ was issued by the District Court for the Southern District of New York, to Robert E. Tod, Commissioner of Immigration at Ellis Island. That court dismissed the petition and remanded the relators. Mrs. Waldman and her children, reaching New York from Europe, were, after examination, detained at Ellis Island on August 28, 1922, for deportation, on the ground that they were liable to become public charges if admitted to the United States, and also because the mother was an illiterate person. She appealed to the Department of Labor, which directed the case to be reopened before a Board of Special Inquiry for the purpose of according her a re-examination regarding her ability to read Yiddish and Hebrew, with direction, if she did not pass it, to deport her and her family, without further reference to the department. She was re-examined. She alleged in her petition that although she was able to read in Yiddish, she was declared illiterate and she and her family were ordered deported on the next sailing and was refused appeal from this decision. She further alleged that she and her family were seeking admission to the United States to avoid religious persecution in their home in Proskurow (once in Russia and now in the Ukraine), that she escaped from there in 1919, and after 17 months spent in securing a passport to this country came here as a refugee; that, if she is deported from the United States, she must be returned to Proskurow, and that she and her children would be in danger of death; that she and they, as refugees from religious persecution, are exempt by the immigration statute from the operation of the literacy test, but that this claim as such refugees had not been considered by the Commissioner of Immigration or the Secretary of Labor pursuant to the rules of the Immigration Bureau, although the facts were fully shown

in her sworn evidence before the Commissioner. Her petition further alleged that relatives of hers, who are responsible citizens and residents of the United States, are willing to furnish a satisfactory bond that the Waldman family will not become public charges; indeed, that they are themselves willing and able to agree to support the family.

The return asked that the writ be quashed because it did not appear that there was no evidence before the department upon which the warrant could be based, or that the issues sought by the petition now to be litigated in the court had not already been determined by the Department of Labor adversely to the aliens. The return exhibits the records of the department and the evidence taken, and a medical certificate showing that one of the daughters, Zenia Waldman, is afflicted with a dislocation of the left hip, causing shortening of the left leg and lameness, which may affect her ability to earn a living, and that for this, and for failure of the mother to pass the language test, all the aliens were properly ordered excluded; that on appeal, after a careful consideration, the Second Assistant Secretary directed that the case be reopened before a Board of Special Inquiry; that another hearing was given by a different Board of Special Inquiry and the minutes of the prior hearing being made a part of the evidence taken and other evidence introduced, a copy of which is annexed. And that the board duly and unanimously reaffirmed the former order of exclusion. The return concludes:

"The proofs and record of the proceeding before mentioned having been duly transmitted to him, the Secretary of Labor, after carefully considering the evidence presented in the record, duly affirmed the excluding decision of the board and directed the deportation of the aliens herein; and for the cause of the detention of the said aliens complained of in the petition herein, deponent says that the said aliens are and since the receipt of said writ of habeas corpus have been held under and in obedience to said writ."

The prayer was that the writ of habeas corpus be dismissed and the aliens remanded to the custody of the commissioner, to be dealt with in accordance with the order of exclusion.

The Circuit Court of Appeals ruled that the failure of the return to set out the details of the test as to the knowledge of Mrs. Waldman in Yiddish and Hebrew, at the first and second hearing, was improper; that the test directed in both Hebrew and Yiddish, which the statute recognized as different languages, was a double one, for which there was no warrant in the statute. Without stressing these defects, the court, pointing out that by section 17 of the Immigration Act of February 5, 1917 (chapter 29, 39 Stat. 874, 887 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289 $\frac{1}{4}$ ii]), and regulations duly issued thereunder, when a case is referred back to a board by the bureau or department, in order that additional evidence may be taken, and a new decision is rendered by the board, the reopened hearing is to be "of the same nature and subject to the same conditions, limitations and privileges as an original hearing," held that the departmental order reopening the case was il-



legal in that it took away the right of appeal after the second examination, and that the warrant of deportation was void. The Circuit Court of Appeals further held that the record so left the case of the child Zenia that it must be assumed that the decision to exclude her was not affirmed by the Department of Labor, and that the department may well have disagreed with the local board as to whether or not the physical defect would interfere with the ability of Zenia to earn a living. The order of the District Court was reversed, with directions to enter an order discharging the relators and releasing their bail.

An application for a rehearing was made to the Circuit Court of Appeals to modify its order, so as not to discharge the relators and their bail, but to direct that the trial court might itself proceed to hear the issues and determine the admissibility of the appellants. The Circuit Court of Appeals declined to make this modification, but said that as the judgment was not *res adjudicata*, the executive authorities might rearrest the relator and institute further proceedings to test the legality of her being in the country. It is the discharge of the relators and their bail by the Circuit Court of Appeals of which the government complains.

Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

We think that the complaint of the government is well founded. The petitioners in the writ of habeas corpus were aliens who had not been legally admitted to the country—that is, neither the immigration authorities nor the court had held that they were entitled to admission. The immigration authorities had ordered their deportation. The Circuit Court of Appeals merely found that in the course of the examination by the immigration authorities the relators had not been given a fair opportunity to appeal to the Secretary of Labor as provided by the statute. This denial of appeal did not give to them a right to admission to the country. In the due and orderly disposition of the writ of habeas corpus, relators should not have been discharged and their bail released, but the order should have been framed so as to secure the benefit of the appeal to the relators, to which the court by its decision had held them entitled. To discharge them was to take them out of the proper custody of the government authorities pending their admission or exclusion, was to entail upon the government the affirmative and initial duty of rearresting them and was improperly discharging the security for their response to any lawful order of the immigration authorities. The mere fact that by rearrest the government would not be confronted by any judgment of *res adjudicata* did not suffice. The power of the court in such a case is indicated by section 761 of the Revised Statutes (Comp. St. § 1289) in reference to habeas corpus. The section provides that a court or justice or judge shall proceed in a summary manner to determine the facts of the case by hearing the testimony and arguments and thereupon to dispose of the party as law and justice require. The law and justice here required under the decision of the Circuit Court of Appeals was that the case should be sent to the Dis-

trict Court with instructions to remand the petitioners to the custody of the immigration authorities, to await the result of the appeal from the judgment of deportation to the Secretary of Labor.

Counsel for the government urge that under three decisions of this court, *Chin Yow v. United States*, 208 U. S. 8, 13, 28 S. Ct. 201, 52 L. Ed. 369; *Kwock Jan Fat v. White*, 253 U. S. 454, 40 S. Ct. 566, 64 L. Ed. 1010, and *Ng Fung Ho v. White*, 259 U. S. 276, 42 S. Ct. 492, 66 L. Ed. 938, the question with respect to which the petitioners have not been given a fair hearing should now be remanded to the District Court for its decision. Without saying that the circumstances might not arise which would justify such a variation in the order from that which we now direct, we do not think that the course taken in the cases cited should guide us here. In those cases the single question was whether the petitioner was a citizen of the United States before he sought admission, a question of frequent judicial inquiry. Here the questions are technical ones involving the educational qualification of an immigrant in a language foreign to ours, and the medical inquiry as to effect of a physical defect on the probability of a child's being able to earn a living or of becoming a public charge. The court is not as well qualified in such cases to consider and decide the issues as the immigration authorities. The statute intends that such questions shall be considered and determined by the immigration authorities. It would seem better to remand the relators to the hearing of the appeal, by the Secretary and his assistants, who have constant practice and are better advised in deciding such questions.

We concur with the Circuit Court of Appeals in its criticism of the record in this case in that it does not set out more fully the details of the test applied in the examinations. The record is defective also in not showing the definite rulings of the commissioner or the Board of Inquiry on the issues made by Mrs. Waldman in her evidence. This made clear her claim that she and her children were refugees from religious persecution relieving her from an educational test; but no finding appears in the record on this point either by the board or the department on appeal. The mere implication that the claim must have been passed on adversely to her because the language test was applied is not enough. If the necessary finding was in fact made, it should be made part of the record. We agree with the Circuit Court of Appeals also that the absence from the record of any finding by the department on appeal as to the issue whether the lameness of Zenia, one of the children, affected her ability to earn a living or made her likely to become a public charge is a defect. The inquiry and finding should have been made. If made, the record should disclose it. If not made, the inquiry should be made and the finding recorded.

We see no reason, therefore, why upon the appeal which it is now decided the Secretary of Labor must afford the relators, he should not consider and make a definite finding on the issues made by the petition, to wit, first whether the relators are not relieved from the test as to language because they are refugees from religious persecution; second

whether, if it be necessary, a proper test as to the reading knowledge of Yiddish only, which Mrs. Waldman had, was sufficient to meet the requirements of the statute, and if not to order another; and, third, whether the lameness of Zenia Waldman is likely to affect her ability to earn her living or to make her a public charge. The order of the Circuit Court of Appeals is reversed and modified in accordance with this opinion, with instructions to remand the petitioners to the custody of the immigration authorities to await the hearing on the appeal before the Secretary of Labor. Failing the granting and hearing of the appeal within 30 days after the coming down of the mandate herein, the relators and their bail are to be discharged. *Mahler v. Eby*, 264 U. S. 32, 46, 44 S. Ct. 283, 68 L. Ed. 549.

Reversed and remanded to the District Court for further proceedings in conformity with this opinion.<sup>5</sup>

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### SECTION 43.—PROHIBITION

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The principal function of the writ of prohibition is to restrain inferior courts from proceeding in matters beyond their jurisdiction. See *Hatfield v. Graham*, 73 W. Va. 759, 81 S. E. 533, L. R. A. 1915A, 175, Ann. Cas. 1917C, 1, p. 334, supra. Its use to control administrative action is exceptional and infrequent. See, for example, *State ex rel. Ellis v. Elkin*, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037 (1895); *Speed v. Common Council*, 98 Mich. 360, 57 N. W. 406, 22 L. R. A. 842, 39 Am. St. Rep. 555 (1894); *People v. Supervisors of Queens County*, 1 Hill (N. Y.) 195, 200 (1841); *People ex rel. Pressmeyer v. Board of Commissioners of Police*, 59 N. Y. 92 (1874). As to use of writ in South Carolina, see *State ex rel. Carter v. Burger*, 1 McMull. (S. C.) 418 (1841), and *State v. County Treasurer*, 4 S. C. 520, 534 (1873).

Writ held not to lie against an administrative body. *La Croix v. County Commissioners of Fairfield County*, 50 Conn. 321, 324, 47 Am. Rep. 648 (1882); *State ex rel. Harrison v. Perry*, 113 Ohio St. 641, 150 N. E. 78 (1925).

<sup>5</sup> Habeas corpus in connection with martial law, see *In re Boyle*, 6 Idaho, 609, 57 P. 706, 45 L. R. A. 832, 96 Am. St. Rep. 286 (1899).

The following cases in this collection are cases of habeas corpus: *In re Sawyer*, 124 U. S. 200, 8 S. Ct. 482, 31 L. Ed. 402 (1888); *Langenberg v. Decker*, 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 108 (1892); *Nishimura Ekiu v. United States*, 142 U. S. 657, 12 S. Ct. 336, 35 L. Ed. 1146 (1892); *Gonzales v. Williams*, 192 U. S. 1, 24 S. Ct. 171, 48 L. Ed. 317 (1903); *Japanese Immigrant Case (Yamataya v. Fisher)*, 189 U. S. 86, 23 S. Ct. 611, 47 L. Ed. 721 (1903); *Chew Hoy Quong v. White (C. C. A.)*, 249 F. 869 (1918); *United States ex rel. Tisi v. Tod*, 264 U. S. 131, 44 S. Ct. 260, 68 L. Ed. 590 (1924); *Mahler v. Eby*, 264 U. S. 32, 44 S. Ct. 283, 68 L. Ed. 549 (1924); *Ng Fung Ho v. White*, 259 U. S. 276, 42 S. Ct. 492, 66 L. Ed. 938 (1922); *United States ex rel. Bilokumsky v. Tod*, 263 U. S. 149, 44 S. Ct. 54, 68 L. Ed. 221 (1923).



## CHAPTER 11

## EQUITABLE RELIEF

## SECTION 44.—INJUNCTION—IN GENERAL

The following brief report indicates the use of injunctions against the action of administrative authorities at an early period:

*Box v. Allen*, 1 Dickens, 49 (April 26, 1727): "Bill to be relieved against an order of the commissioners of sewers. Demurrer to so much of the bill as sought to alter any of the orders of the commissioners, or to return any money by them received, for that the remedy was at law, and no equity to be relieved in this court. The demurrer was overruled."

Generally speaking, however, such use is of relatively recent origin. See *Kerrison v. Sparrow*, Cooper's Cases in Chancery temp. Lord Eldon, 305 (1815); *Movers v. Smedley*, 6 Johns. Ch. (N. Y.) 28 (1822), Kent, Ch.: "This is not the case of a private trust, but the official act of a political body; and in the whole history of the English Court of Chancery there is no instance of the assertion of such a jurisdiction as is now contended for."

In many cases the remedy in equity has been applied without being questioned. See *Cook Co. v. C., B. & Q. R. Co.*, 35 Ill. 460, 467; *C. B. & Q. R. Co. v. Cole*, 75 Ill. 591; *Porter v. R., R. I., etc., R. Co.*, 76 Ill. 561; *Hersey v. Board of Supervisors*, 37 Wis. 75; *Bank of Utica v. Utica*, 4 Paige (N. Y.) 399, 27 Am. Dec. 71; *Noble v. Union River Logging R. R.*, 147 U. S. 165, 13 S. Ct. 271, 37 L. Ed. 123, post, p. 670 (see *Cruickshank v. Bidwell*, 176 U. S. 73, 80, 20 L. Ed. 280, 44 L. Ed. 377); *Minnesota v. Hitchcock*, 185 U. S. 373, 22 S. Ct. 650, 46 L. Ed. 954 (see *Oregon v. Hitchcock*, 202 U. S. 60, 26 S. Ct. 568, 50 L. Ed. 935).

SECTION 45.—SAME—TO RESTRAIN POLITICAL ACTS  
AND REMOVAL FROM OFFICE

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STATE OF GEORGIA v. STANTON.

Supreme Court of United States, 1867. 6 Wall. 50, 18 L. Ed. 721.

This was a bill filed April 15, 1867, in this court, invoking the exercise of its original jurisdiction, against Stanton, Secretary of War, Grant, General of the Army, and Pope, Major General, assigned to command of the Third military district, consisting of the states of Georgia, Florida and Alabama (a district organized under the Act of Congress of the 2d March, 1867, entitled "An act to provide for the more efficient government of the rebel states," and an act of the 23d of the same month supplementary thereto), for the purpose of restraining the defendants from carrying into execution the several provisions of these acts, acts known in common parlance as the "Reconstruction Acts." Both these acts had been passed over the President's veto. \* \* \*

NELSON, J. \* \* \* By the second section of the third article of the Constitution "the judicial power extends to all cases, in law and equity, arising under the Constitution, the laws of the United States," etc., and, as applicable to the case in hand, "to controversies between a state and citizens of another state," which controversies, under the judiciary act, may be brought, in the first instance, before this court in the exercise of its original jurisdiction; and we agree that the bill filed presents a case which, if it be the subject of judicial cognizance, would, in form, come under a familiar head of equity jurisdiction—that is, jurisdiction to grant an injunction to restrain a party from a wrong or injury to the rights of another, where the danger, actual or threatened, is irreparable, or the remedy at law inadequate. But, according to the course of proceeding under this head in equity, in order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger, as we have seen, must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity.

The remaining question on this branch of our inquiry is whether, in view of the principles above stated, and which we have endeavored to explain, a case is made out in the bill of which this court can take judicial cognizance. In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of Congress, inasmuch as such execution would annul and totally abolish the existing state government of Georgia, and es-

tablish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the state, by depriving it of all the means and instrumentalities where by its existence might, and otherwise would, be maintained.

This is the substance of the complaint, and of the relief prayed for. The bill, it is true, sets out in detail the different and substantial changes in the structure and organization of the existing government, as contemplated in these acts of Congress, which, it is charged, if carried into effect by the defendants, will work this destruction. But they are grievances, because they necessarily and inevitably tend to the overthrow of the state as an organized political body. They are stated, in detail, as laying a foundation for the interposition of the court to prevent the specific execution of them, and the resulting threatened mischief. So in respect to the prayers of the bill. The first is that the defendants may be enjoined against doing or permitting any act or thing, within or concerning the state, which is or may be directed or required of them, by or under the two acts of Congress complained of; and the remaining four prayers are of the same character, except more specific as to the particular acts threatened to be committed.

That these matters, both as stated in the body of the bill and in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court.

It is true the bill, in setting forth the political rights of the state and of its people to be protected, among other matters, avers that Georgia owns certain real estate and buildings therein, state capitol and executive mansion, and other real and personal property, and that putting the acts of Congress into execution, and destroying the state, would deprive it of the possession and enjoyment of its property. But it is apparent that this reference to property and statement concerning it are only by way of showing one of the grievances resulting from the threatened destruction of the state, and in aggravation of it, not as a specific ground of relief. This matter of property is neither stated as an independent ground nor is it noticed at all in the prayers for relief. Indeed, the case, as made in the bill, would have stopped far short of the relief sought by the state, and its main purpose and design given up, by restraining its remedial effect simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us.



Having arrived at the conclusion that this court, for the reasons above stated, possesses no jurisdiction over the subject-matter presented in the bill for relief, it is unimportant to examine the question as it respects jurisdiction over the parties defendants. \* \* \*

Bill dismissed for want of jurisdiction.<sup>1</sup>

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In re SAWYER et al.

Supreme Court of United States, 1888. 124 U. S. 200, 8 Sup. Ct. 482,  
31 L. Ed. 402.

[Albert L. Parsons, police judge of the city of Lincoln, Neb., had been subjected to proceedings on the part of the mayor and the city council of said city looking to his removal from office. Claiming that such proceedings violated the provisions of the Constitution of the United States forbidding that any person should be deprived of life, liberty, or property without due process of law, as well as certain other provisions, he filed his bill in equity in the Circuit Court of the United States for the District of Nebraska, and obtained a preliminary injunction restraining the mayor and eleven members of the city council from proceeding further in said matter. The mayor

<sup>1</sup> "The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance. The impropriety of such interference will be clearly seen upon consideration of its possible consequences. Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court? These questions answer themselves. It is true that a state may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties, and that no such bill ought to be received by us. It has been suggested that the bill contains a prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of Congress by Andrew Johnson is relief against its execution by the President. A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President or as a citizen of a state. The motion for leave to file the bill is therefore denied." *State of Mississippi v. Johnson*, 4 Wall. 475, 500, 18 L. Ed. 437 (1866).

In *Wisconsin*, the Supreme Court exercises original jurisdiction in equity for the purpose of determining the legality of the action of the Secretary of State in recognizing one of two rival factors as the regular party organization. *State ex rel. Cook v. Houser*, 122 Wis. 534, 100 N. W. 964 (1904).

and the council, in disregard of the injunction, proceeded with the charges, and Parsons was forcibly removed from office. The Circuit Court thereupon issued a rule to the mayor and councilmen to show cause why they should not be attached for contempt. Upon hearing, they were adjudged guilty of contempt, and, failing to pay the fines imposed upon them, were taken and held in custody by the marshal. They thereupon petitioned the Supreme Court of the United States for a writ of habeas corpus.]

GRAY, J. The question presented by this petition of the mayor and councilmen of the city of Lincoln for a writ of habeas corpus is whether it was within the jurisdiction and authority of the Circuit Court of the United States, sitting as a court of equity, to make the order under which the petitioners are held by the marshal.

Under the Constitution and laws of the United States, the distinction between common law and equity, as existing in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. *Fenn v. Holme*, 21 How. 481, 484-487, 16 L. Ed. 198; *Thompson v. Railroad Co.*, 6 Wall. 134, 18 L. Ed. 765; *Heine v. Levee Com'rs*, 19 Wall. 655, 22 L. Ed. 223.

The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government.

Any jurisdiction over criminal matters that the English Court of Chancery ever had became obsolete long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of habeas corpus for the discharge of persons unlawfully imprisoned. 2 Hale, P. C. 147; *Gee v. Pritchard*, 2 Swanst. 402, 413; 1 Spence, Eq. Jur. 689, 690; *Attorney General v. Insurance Co.*, 2 Johns. Ch. (N. Y.) 371, 378.

From long before the Declaration of Independence, it has been settled in England that a bill to stay criminal proceedings is not within the jurisdiction of the Court of Chancery, whether those proceedings are by indictment or by summary process.

Lord Chief Justice Holt, in declining, upon a motion in the Queen's Bench for an attachment against an attorney for professional misconduct, to make it a part of the rule to show cause that he should not move for an injunction in chancery in the mean time, said: "Sure, chancery would not grant an injunction in a criminal matter under examination in this court; and, if they did, this court would break it, and protect any that would proceed in contempt of it." *Holderstaffe v. Saunders*, Holt. 136, 6 Mod. 16.

Lord Chancellor Hardwicke, while exercising the power of the Court of Chancery, incidental to the disposition of a case pending before it, of restraining a plaintiff who had, by his bill, submitted his rights to its determination, from proceeding as to the same matter before another tribunal, either by indictment or by action, asserted in the strongest terms the want of any power or jurisdiction to entertain a bill for an injunction to stay criminal proceedings, saying: "This court has not originally and strictly any restraining power over criminal prosecutions." And again: "This court has no jurisdiction to grant an injunction to stay proceedings on a mandamus, nor to an indictment, nor to an information, nor to a writ of prohibition, that I know of." *Mayor, etc., v. Pilkington*, 2 Atk. 302, 9 Mod. 273; *Montague v. Dudman*, 2 Ves. Sr. 396, 398.

The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. *Attorney General v. Cleaver*, 18 Ves. 211, 220; *Turner v. Turner*, 15 Jur. 218; *Saull v. Browne*, 10 Ch. App. 64; *Kerr v. Preston*, 6 Ch. Div. 463.

Mr. Justice Story, in his *Commentaries on Equity Jurisprudence*, affirms the same doctrine. 2 Story, Eq. Jur. § 893. And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the state, or under municipal ordinances. *West v. Mayor, etc.*, 10 Paige (N. Y.) 539; *Davis v. American Soc.*, 75 N. Y. 362; *Tyler v. Hamersley*, 44 Conn. 419, 422, 26 Am. Rep. 479; *Stuart v. Board Sup'rs*, 83 Ill. 341, 25 Am. Rep. 397; *Devron v. First Municipality*, 4 La. Ann. 11; *Levy v. Shreveport*, 27 La. Ann. 620; *Moses v. Mayor, etc.*, 52 Ala. 198; *Gault v. Wallis*, 53 Ga. 675; *Phillips v. Mayor, etc.*, 61 Ga. 386; *Cohen v. Goldsboro Com'rs*, 77 N. C. 2; *Oil Co. v. Little Rock*, 39 Ark. 412; *Spink v. Francis (C. C.)* 19 Fed. 670, and 20 Fed. 567; *Suess v. Noble (C. C.)* 31 Fed. 855.

It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is intrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by certiorari, error, or appeal, or by mandamus, prohibition, quo warranto, or information in the nature of a writ of quo warranto, according to the circumstances of the case, and the mode of procedure, established by the common law or by statute.

No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer. But an information in the Court of Chancery for the regulation of Harrow



School, within its undoubted jurisdiction over public charities, was dismissed so far as it sought a removal of governors unlawfully elected, Sir William Grant saying: "This court, I apprehend, has no jurisdiction with regard either to the election or the amotion of corporators of any description." *Attorney General v. Clarendon*, 17 Ves. 491, 498.

In the courts of the several states, the power of a court of equity to restrain by injunction the removal of a municipal officer has been denied in many well-considered cases.

Upon a bill in equity in the Court of Chancery of the state of New York by a lawfully appointed inspector of flour, charging that he had been ousted of his office by one unlawfully appointed in his stead by the Governor, and that the new appointee was insolvent, and praying for an injunction, a receiver, and an account of fees, until the plaintiff's title to the office could be tried at law, Vice Chancellor McCoun said: "This court may not have jurisdiction to determine that question, so as to render a judgment or a decree of ouster of the office." But he overruled a demurrer, upon the ground that the bill showed a prima facie title in the plaintiff. *Tappan v. Gray*, 3 Edw. Ch. (N. Y.) 450. On appeal, Chancellor Walworth reversed the decree, "upon the ground that at the time of the filing of this bill the Court of Chancery had no jurisdiction or power to afford him any relief." 9 Paige, 507, 509, 512. And the chancellor's decree was unanimously affirmed by the Court of Errors, upon Chief Justice Nelson's statement that he concurred with the Chancellor respecting the jurisdiction of courts of equity in cases of this kind. 7 Hill, 259.

The Supreme Court of Pennsylvania has decided that an injunction cannot be granted to restrain a municipal officer from exercising an office which he has vacated by accepting another office, or from entering upon an office under an appointment by a town council, alleged to be illegal; but that the only remedy in either case is at law by quo warranto. *Hagner v. Heyberger*, 7 Watts & S. (Pa.) 104, 42 Am. Dec. 220; *Updegraff v. Crans*, 47 Pa. 103.

The Supreme Court of Iowa, in a careful opinion delivered by Judge Dillon, has adjudged that the right to a municipal office cannot be determined in equity upon an original bill for an injunction. *Cochran v. McCleary*, 22 Iowa, 75.

In *Delahanty v. Warner*, 75 Ill. 185, 20 Am. Rep. 237, it was decided that a court of chancery had no jurisdiction to entertain a bill for an injunction to restrain the mayor and aldermen of a city from unlawfully removing the plaintiff from the office of superintendent of streets, and appointing a successor; but that the remedy was at law by quo warranto or mandamus.

In *Sheridan v. Colvin*, 78 Ill. 237, it was held that a court of chancery had no jurisdiction to restrain by injunction a city council from passing an ordinance unlawfully abolishing the office of com-

missioner of police; and the court, repeating in great part the opening propositions of Kerr on Injunctions, said: "It is elementary law that the subject-matter of the jurisdiction of a court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property; nor do matters of a political nature come within the jurisdiction of the Court of Chancery; nor has the Court of Chancery jurisdiction to interfere with the duties of any department of government, except under special circumstances, and when necessary for the protection of rights of property." 78 Ill. 247.

Upon like grounds it was adjudged in *Dickey v. Reed*, 78 Ill. 261, that a court of chancery had no power to restrain by injunction a board of commissioners from canvassing the results of an election; and that orders granting such an injunction, and adjudging the commissioners guilty of contempt for disregarding it, were wholly void. And in *Harris v. Schryock*, 82 Ill. 119, the court, in accordance with its previous decisions, held that the power to hold an election was political, and not judicial, and therefore a court of equity had no authority to restrain officers from exercising that power.

Similar decisions have been made, upon full consideration, by the Supreme Court of Alabama, overruling its own prior decisions to the contrary. *Beebe v. Robinson*, 52 Ala. 66; *Moulton v. Reid*, 54 Ala. 320.

The statutes of Nebraska contain special provisions as to the removal of officers of a county or of a city. "All county officers, including justices of the peace, may be charged, tried, and removed from office for official misdemeanors" of certain kinds, by the board of county commissioners, upon the charge of any person. "The proceedings shall be as nearly like those in other actions as the nature of the case admits, excepting where otherwise provided in this chapter." "The complaint shall be by an accuser against the accused, and shall contain the charges with the necessary specifications under them, and be verified by the affidavit of any elector of the state that he believes the charges to be true." No formal answer or replication is required, "but, if there be an answer and reply, the provisions of this [the?] statute relating to pleadings in actions shall apply." "The questions of fact shall be tried as in other actions, and, if the accused is found guilty, judgment shall be entered removing the officer from his office, and declaring the latter vacant, and the clerk shall enter a copy of the judgment in the election book." Neb. Comp. St. c. 18, art. 2, § 7.

The nature of this proceeding before county commissioners has been the subject of several decisions by the Supreme Court of the state. In the earliest one the court declared: "The proceeding is

quasi criminal in its nature, and the incumbent undoubtedly may be required to appear without delay, and show cause why he should not be removed. But questions of fact must be tried as in other actions, and are subject to review on error. The right to a trial upon distinct and specific charges is secured to every one thus charged with an offense for which he is liable to be removed from office." "Neither is it sufficient for the board to declare and resolve that the office is vacant. There must be a judgment of ouster against the incumbent." *State v. Sheldon*, 10 Neb. 452, 456, 6 N. W. 757.

The authority conferred upon county commissioners to remove county officers has since been held not to be an exercise of strictly judicial power, within the meaning of that provision of the Constitution of Nebraska which requires that "the judicial power of this state shall be vested in a Supreme Court, district courts," and other courts and magistrates therein enumerated. *Const. Neb. art. 6, § 1*; *State v. Oleson*, 15 Neb. 247, 18 N. W. 45. But it has always been considered as so far judicial in its nature that the order of the county commissioners may be reviewed on error in the district court of the county, and ultimately in the supreme court of the state. *State v. Sheldon*, above cited; *Minkler v. State*, 14 Neb. 181, 15 N. W. 330; *State v. Meeker*, 19 Neb. 444, 448, 27 N. W. 427. See, also, *Railroad v. Washington Co.*, 3 Neb. 30, 41; *Code Civ. Proc. Neb. §§ 580-584, 599*; *Crim. Code, (Ed. 1885,) § 572*.

This view does not substantially differ from that taken in other states, where similar orders have been reviewed by writ of certiorari, as proceedings of an inferior tribunal or board of officers, not commissioned as judges, yet acting judicially, and not according to the course of the common law. *Charles v. Mayor, etc.*, 27 N. J. Law, 203; *People v. Fire Com'rs*, 72 N. Y. 445; *Donahue v. County of Will*, 100 Ill. 94.

In Nebraska, as elsewhere, the validity of the removal of a public officer, and the title of the person removed, or of a new appointee, to the office, may be tried by quo warranto or mandamus. *Comp. St. Neb. c. 19, §§ 13, 24*; *Id. c. 71*; *Code Civ. Proc. §§ 645, 704*; *Cases of Sheldon, Oleson, and Meeker*, above cited; *Queen v. Saddlers' Co.*, 10 H. L. Cas. 404; *Osgood v. Nelson*, L. R. 5 H. L. 636. \* \* \*

The whole object of the bill in equity filed by Parsons, the police judge of the city of Lincoln, against the mayor and councilmen of the city, upon which the Circuit Court of the United States made the order for the disregard of which they are in custody, is to prevent his removal from the office of police judge. No question of property is suggested in the allegations of matters of fact in the bill, or would be involved in any decree that the court could make thereon.

The case stated in the bill is that charges in writing against Parsons for appropriating to his own use moneys of the city were filed, as required by the original ordinance, by Sheedy and Saunders (Hyatt, not otherwise named in those charges, would seem to have signed



them as the additional witness required by that ordinance); that the charges were referred by the mayor to a committee of three members of the council; that upon notice to the accused, and his appearance before that committee, he objected that the committee had no authority to try the charges, and the committee so reported to the council; that thereupon Sheedy and Saunders procured the passage of the amended ordinance, giving a committee, instead of the whole council, power to try the charges, and report its finding to the council; that after the passage of this ordinance, and against his protest, the committee resumed the trial, and, in order to favor and protect his accusers, and fraudulently to obtain his removal from office, made a report to the city council, falsely stating that they reported all the evidence, and fraudulently suppressing a book which he had offered in evidence, and finding him guilty, and recommending that his office be declared vacant, and be filled by the appointment of some other person; and that the mayor and city council set the matter down for final vote at a future day named, and threatened and declared that they would then, without hearing or reading the evidence taken before the committee, declare the office vacant, and appoint another person to fill it.

The bill prays for an injunction to restrain the mayor and councilmen of the city of Lincoln from proceeding any further with the charges against Parsons, or taking any vote on the report of the committee, or declaring the office of police judge vacant, or appointing any person to fill that office. \* \* \*

It has been contended by both parties, in argument, that the proceeding of the city council for the removal of Parsons upon the charges filed against him is in the nature of a criminal proceeding; and that view derives some support from the judgment of the Supreme Court of Nebraska in *State v. Sheldon*, 10 Neb. 452, 456, 6 N. W. 757, before cited. But, if the proceeding is of a criminal nature, it is quite clear, for the reasons and upon the authorities set forth in the earlier part of this opinion, that the case stated in the bill is wholly without the jurisdiction of any court of equity.

If those proceedings are not to be considered as criminal or quasi criminal, yet if, by reason of their form and object, and the acts of the Legislature and decisions of the courts of Nebraska as to the appellate jurisdiction exercised in such cases by the judicial power of the state, they are to be considered as proceedings in a court of the state (of which we express no decisive opinion), the restraining order of the Circuit Court was void, because in direct contravention of the peremptory enactment of Congress that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except when authorized by a bankrupt act. Act March 2, 1793, c. 22, § 5 (1 St. 335); *Diggs v. Walcott*, 4 Cranch, 179, 2 L. Ed. 587; *Peck v. Jenness*, 7 How. 612, 625, 12 L. Ed. 841; Rev. St. § 720 (U. S. Comp. St. 1901, p. 581); *Watson v. Jones*, 13

Wall. 679, 719, 20 L. Ed. 666; *Haines v. Carpenter*, 91 U. S. 254, 23 L. Ed. 345; *Dial v. Reynolds*, 96 U. S. 340, 24 L. Ed. 644; *Sargent v. Helton*, 115 U. S. 348, 6 Sup. Ct. 78, 29 L. Ed. 412.

But if those proceedings are to be considered as neither criminal nor judicial, but rather in the nature of an official inquiry by a municipal board intrusted by law with the administration and regulation of the affairs of the city, still, their only object being the removal of a public officer from his office, they are equally beyond the jurisdiction and control of a court of equity.

The reasons which preclude a court of equity from interfering with the appointment or removal of public officers of the government from which the court derives its authority apply with increased force when the court is a court of the United States, and the officers in question are officers of a state. If a person claiming to be such an officer is, by the judgment of a court of the state, either in appellate proceedings or upon a mandamus or quo warranto, denied any right secured to him by the Constitution of the United States, he can obtain relief by a writ of error from this court.

In any aspect of the case, therefore, the Circuit Court of the United States was without jurisdiction or authority to entertain the bill in equity for an injunction. As this court has often said: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court; but, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void." *Elliott v. Peirsol*, 1 Pet. 328, 340, 7 L. Ed. 164; *Wilcox v. Jackson*, 13 Pet. 498, 511, 10 L. Ed. 264; *Hickey v. Stewart*, 3 How. 750, 762, 11 L. Ed. 814; *Thompson v. Whitman*, 18 Wall. 457, 467, 21 L. Ed. 897.

We do not rest our conclusion in this case, in any degree, upon the ground, suggested in argument, that the bill does not show a matter in controversy of sufficient pecuniary value to support the jurisdiction of the Circuit Court, because an apparent defect of its jurisdiction in this respect, as in that of citizenship of parties, depending upon an inquiry into facts which might or might not support the jurisdiction, can be availed of only by appeal or writ of error, and does not render its judgment or decree a nullity. *Prigg v. Adams*, 2 Salk. 674, Carth. 274; *Fisher v. Bassett*, 9 Leigh (Va.) 119, 131-133, 33 Am. Dec. 227; *Navigation Co. v. Homestead Co.*, 123 U. S. 552, 8 Sup. Ct. 217, 31 L. Ed. 202. Neither do we say that, in a case belonging to a class or subject which is within the jurisdiction both of courts of equity and of courts of law, a mistake of a court of equity, in deciding that in the particular matter before it there could be no full, adequate, and complete remedy at law, will render its decree absolutely void.

But the ground of our conclusion is, that whether the proceedings of the city council of Lincoln for the removal of the police judge, upon charges of misappropriating moneys belonging to the city, are to be regarded as in their nature criminal or civil, judicial or merely administrative, they relate to a subject which the Circuit Court of the United States, sitting in equity, has no jurisdiction or power over, and can neither try and determine for itself, nor restrain by injunction the tribunals and officers of the state and city from trying and determining. The case cannot be distinguished in principle from that of a judgment of the common bench in England in a criminal prosecution, which was *coram non judice*, or the case of a sentence passed by the Circuit Court of the United States upon a charge of an infamous crime, without a presentment or indictment by a grand jury. Case of the Marshalsea, 5 [10] Coke, 68, 76; *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849.

The Circuit Court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumed are null and void. The restraining order, in the nature of an injunction it had no power to make. The adjudication that the defendants were guilty of a contempt in disregarding that order is equally void, their detention by the marshal under that adjudication is without authority of law, and they are entitled to be discharged. *Ex parte Rowland*, 104 U. S. 604, 26 L. Ed. 861; *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; *In re Ayers*, 123 U. S. 443, 507, 8 Sup. Ct. 164, 31 L. Ed. 216.

Writ of habeas corpus to issue.

WAITE, C. J. (dissenting). I am not prepared to decide that an officer of a municipal government cannot, under any circumstances, apply to a court of chancery to restrain the municipal authorities from proceeding to remove him from his office without the authority of law. There may be cases, in my opinion, when the tardy remedies of *quo warranto*, *certiorari*, and other like writs will be entirely inadequate. I can easily conceive of circumstances under which a removal, even for a short period, would be productive of irremediable mischief. Such cases may rarely occur, and the propriety of such an application may not often be seen; but if one can arise, and if the exercise of the jurisdiction can ever be proper, the proceedings of the court in due course upon a bill filed for such relief will not be void, even though the grounds on which it is asked may be insufficient. If the court can take jurisdiction of such a case under any circumstances, it certainly must be permitted to inquire, when a bill of that character is filed, whether the case is one that entitles the party to the relief he asks, and, if necessary to prevent wrong in the meantime, to issue in its discretion a temporary restraining order for that purpose. Such an order will not be void, even though it



may be found on examination to have been improvidently issued. While in force it must be obeyed, and the court will not be without jurisdiction to punish for its contempt.

Such, in my opinion, was this case, and I therefore dissent from the judgment which has been ordered.<sup>2</sup>

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## SECTION 46.—SAME—TO RESTRAIN ENFORCEMENT OF ORDINANCES

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### CITY OF CHICAGO v. CHICAGO CITY RY. CO.

Supreme Court of Illinois, 1906. 222 Ill. 560, 78 N. E. 890.

Bill by the Chicago City Railway Company and others against the City of Chicago to enjoin the enforcement of a city ordinance and to restrain the prosecution of certain suits for the recovery of penalties. From a decree in favor of complainants, defendant appeals. Bill dismissed.

CARTWRIGHT, J. On October 23, 1905, the city council of the city of Chicago, appellant, passed an ordinance amending sections 1958 and 1959 of the Revised Municipal Code of the city, so as to read as follows: [Here follows the text of the ordinance, which makes certain provisions for the comfort and safety of passengers on street cars.]

The Chicago City Railway Company and the receivers of the Chicago Union Traction Company, appellees, filed their bill in this case in the circuit court of Cook county praying the court to enjoin

<sup>2</sup> Accord: *White v. Berry*, 171 U. S. 366, 18 Sup. Ct. 917, 43 L. Ed. 199 (1898). But see *Ekern v. McGovern*, 154 Wis. 157, 142 N. W. 595, 46 L. R. A. (N. S.) 795 (1913).

As to the development of the legal conception of office, changing from a property right to a public function or position under the government, constituting neither property nor contract, see the following authorities:

Blackstone's Commentaries, II, 36, office one of incorporeal hereditaments; St. 5 & 6 Edw. IV, c. 16, offices concerning justice and revenue may not be sold, extended to all offices by St. 49 Geo. III, c. 126; Coke, Littleton, 36, grant of office concerning justice, revenue, commonwealth, or benefit of subject, void if to an incompetent person; Coke, Littleton, § 378, in an office concerning the commonwealth it is a condition in law that it be lawfully kept; Reynel's Case, 9 Coke Rep. 95a (1611), a judicial office not grantable for years, since otherwise it might vest in an executor.

Officers appointed *durante bene placito*, (revenue officers,) St. 14 Rich. II, c. 1. As to other royal appointments, see *Smyth v. Latham*, 9 Bing. 694 (1833); *Shenton v. Smith* [1895] App. Cas. 229, 235.

Corporate officers, inherent power of motion, *Rex v. Richardson*, 1 Burr. 517 (1758).

American theory: *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677 (1833); *Butler v. Pennsylvania*, 10 How. 402, 13 L. Ed. 472 (1850); *Wilson v. North Carolina*, 169 U. S. 586, 18 Sup. Ct. 435, 42 L. Ed. 865 (1898); *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. 890, 1009, 44 L. Ed. 1187 (1900).

appellant from enforcing said ordinance so far as it is designed to compel them to furnish a sufficient number of cars to carry passengers comfortably and without overcrowding, from prosecuting suits against them to enforce the payment of any penalty for any alleged violation of the provision in question, and from bringing any further suits or taking any steps or proceeding whatsoever thereunder.

The amended bill alleges that the provision requiring the appellees to furnish a sufficient number of cars to carry passengers comfortably and without overcrowding is void on three grounds, which are stated by their counsel in their brief and argument, as follows: "(1) That it is in violation of paragraph 96, art. 5, Cities and Villages Act (Hurd's Rev. St. 1905, c. 24, § 62), which provides that 'no fine or penalty shall exceed \$200 for a single offense,' and also section 11 of article 2 of the Constitution, which provides that 'penalties shall be proportioned to the nature of the offense.' (2) That it is uncertain, in that it does not sufficiently define the offense for which its multiplied penalties are imposed, and is for that reason void. (3) That it is unreasonable, and therefore void."

The circuit court overruled appellant's demurrer to the bill as amended, and, appellant having elected to stand by the demurrer, the court entered a final decree finding that said provision of the ordinance is void, and enjoining appellant from enforcing or attempting to enforce the same, and from further prosecuting suits brought against the appellees.

The material facts alleged in the amended bill and admitted by the demurrer are: That before, and at the time of, the passage of the ordinance the Chicago City Railway Company, one of the complainants maintained and operated 220 miles of street railway on the streets in the south division of the city of Chicago; that the receivers of the Chicago Union Traction Company, the other complainant, maintained and operated 303.93 miles of street railway on the streets in the north and west divisions of the city, with terminal connections in the south division; that the business center of the city is in the south division, in what is known as the "down-town loop"; that complainants are the only surface street railways serving the city of Chicago, except 12 other lines of surface street railway operating in outlying districts and not owning down-town terminals; that complainants furnish transportation for more than 2,000,000 people, and for almost all the population of the city; that it is, and has been, the custom to permit passengers to stand in the aisles and on the platforms, and all street cars are provided with straps and other devices to accommodate standing passengers; that complainants have made efforts to procure additional cars, but they can only be obtained by placing orders with street car builders and manufacturers from three to four months before the order can be filled; that during the rush hours of the day it is impossible to prevent congestion of travel in the business center; that congestion and disturbances are

caused by various conditions set out in the bill; and that the ordinance is unreasonable, and therefore void as applied to complainants, because it is impossible for them to comply with it. The bill alleges that 60 suits have been brought against the Chicago City Railway Company by the defendant before a justice of the peace; that 100 like suits have been brought against the receivers; that a suit in debt has been brought against each complainant in the circuit court, and in each suit the declaration contains 25 counts for violations of the ordinance; and that the city intends to bring numerous other suits for like violations.

The efforts of counsel for appellees, in their brief and argument, are directed to giving such an interpretation to the ordinance as to render it void. They contend that it imposes a penalty of not less than \$25 nor more than \$100 daily for each one of the thousands of cars operated by them, respectively, in case one car is overcrowded, and therefore the penalty exceeds \$200 for one offense and is not proportioned to the nature of the offense; that there is such uncertainty in the meaning of the words "comfortably" and "overcrowding" that the ordinance is void on that account; and that under the facts alleged in the bill the provision in question is unreasonable, and therefore void. The ground upon which they say that a court of equity ought to intervene and prevent enforcement of the ordinance is that these two complainants are members of a class, and that a multiplicity of suits will thereby be prevented. Counsel for appellant deny that the provision of the ordinance in question is void for any of the reasons assigned. They contend that the provision is a valid exercise of the police power; that it was enacted in the interest of the public health, safety, and welfare; that the prosecutions under it are of a criminal or quasi criminal nature; and that equity has no jurisdiction to enjoin the prosecution of suits of that nature.

It is settled beyond controversy that a court of equity has no jurisdiction to interfere with prosecutions for criminal offenses, and it makes no difference whether the prosecution is under a statute which applies to the state at large or under an ordinance which is in force only in a particular municipality. Courts of equity deal only with civil and property rights, and their powers do not extend to determining what laws or ordinances are valid or invalid unless such determination is incidental to the protection of rights recognized by courts of equity alone. \* \* \*

In the bill in this case no facts are stated which would constitute an irreparable injury to complainants. Many suits have been instituted, but the imposition of many penalties for many violations of an ordinance does not amount to irreparable injury. An offender cannot, by multiplying his offense, invoke the aid of a court of equity. *Moses v. Mayor of Mobile*, 52 Ala. 198. If a court could take jurisdiction of a bill to declare an ordinance void because of the numerous prosecutions under it, a complainant would be able to confer ju-



risdiction by repeating his offense, and of course that could not be so. The fact that a great many suits had been brought against a single party was regarded as a sufficient cause for enjoining the prosecution of all the suits but one in the case of Third Avenue Railroad Co. v. Mayor of New York, 54 N. Y. 159. The city had brought 77 suits in a justice's court to recover penalties for violating city ordinances concerning the running of cars without a license. The railroad company brought its suit to secure an injunction against all of the suits except one, and offered to abide the final decision of that one. The relief was granted upon the ground that a justice's court had no power to consolidate the actions.

But this court held a different doctrine in the case of Chicago, Burlington & Quincy Railroad Co. v. City of Ottawa, 148 Ill. 397, 36 N. E. 85. In that case there were prosecutions before a justice of the peace for violations of an ordinance, and appeals were taken from judgments rendered. Ten other suits were begun, returnable on successive days, Sundays excepted, and the prayer of the bill was that the defendant be restrained from prosecuting under the ordinance, and for a temporary writ restraining the city from prosecuting any other suits except the two then pending on appeal in the circuit court. The court held that every question arising in the suits could be settled and determined on the trial of a case in the circuit court, which was entirely competent to decide whether the ordinance was valid or not, and that the circuit court was right in refusing to enjoin the prosecution of any of the suits. In this case all the questions can be finally settled in an action of debt in the circuit court, or upon appeal from a justice's judgment. Even if the controversy would not be finally settled in one suit against each complainant, this bill could not be maintained on the ground that it is a bill of peace to put an end to unnecessary and vexatious litigation. In such a case the rights of the parties must be finally adjudicated in a court of law. In cases where one judgment is not conclusive in a subsequent suit, equity will sometimes interfere to prevent litigation which has become useless and unavailing, but the question must first be determined in at least one action at law. The court will never entertain a bill of peace so long as the right of the complainant is uncertain.

There are cases in which a court of equity will interfere to enjoin the enforcement of an ordinance for the reason that a multiplicity of suits will be prevented thereby, and it is argued that this is such a case. The bill is filed by two complainants, who say that they also ask relief for all others similarly situated. The facts stated, however, do not show that any other persons or corporations are similarly situated. It appears from the bill that the complainants serve practically the whole city of Chicago; that the population served by them is upwards of 2,000,000; and that, with the exception of 12 other lines operating in outlying districts and not owning down-

town terminals, they are the only persons or corporations furnishing street railway transportation. It does not appear that the few other persons or corporations operating in outlying and sparsely settled districts do not furnish a sufficient number of cars, or that there is any necessity in such districts for overcrowding, or that overcrowding cars is permitted, or that any prosecution has been begun or threatened against any other person or corporation, or that any other person or corporation has suffered, or will suffer, any hardship, or make any complaint whatever of the ordinance or its provisions. The case is not at all like one where a license is required for carrying on an occupation or business, where the inference is that those engaged in the occupation or business will be required to procure the license and pay the fee therefor. The bill sets up conditions respecting these complainants and their business which could have no application to any other party, and it is clear that the controversy is between the two complainants and the defendant. There is nothing in the bill to justify the assertion that they represent a class, and the bill shows that the supposed class is not numerous.

Under the rule that equity will sometimes intervene to prevent a multiplicity of suits, it was held in *City of Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408, 67 Am. St. Rep. 224, that 373 complainants, suing in behalf of themselves and between 200,000 and 300,000 others similarly situated, could maintain a bill to enjoin the enforcement of an ordinance requiring an annual license fee. That was a case where a license was required, and a fee exacted, from the complainants and all others who made use of means of travel in the city of Chicago. They were all similarly situated. The case of *Wilkie v. City of Chicago*, 188 Ill. 444, 58 N. E. 1004, 80 Am. St. Rep. 182, was a similar one. In that case 78 complainants filed a bill in behalf of themselves and 900 or more others from whom the city of Chicago exacted a license fee for pursuing their occupation. Another case where it was held that a court of equity might properly interfere was *Spiegler v. City of Chicago*, 216 Ill. 114, 74 N. E. 718, where complainants, on behalf of themselves and 3,000 or 4,000 other persons engaged in the same business as themselves, joined in a bill to prevent the enforcement of an ordinance licensing and regulating that business. In all of those cases there was actual application of the ordinance to numerous persons, all of whom were in like situations. In the case of *German Alliance Ins. Co. v. Van Cleave*, 191 Ill. 410, 61 N. E. 94, 42 corporations, who were complainants, filed a bill to enjoin the defendant from paying over to the State Treasurer moneys collected from them as a tax. It would have required at least 42 suits to accomplish the purpose of the bill, and the facts and law in each case would have been exactly the same. It was held that the case was a proper one for the exercise of equitable powers. In the case of *North American Ins. Co. v. Yates*, 214 Ill. 272, 73 N. E. 423, a bill was filed by the insurance superintendent against 20 companies and 33 individuals to enjoin

them from transacting the business of fire insurance without complying with the law. It was held that in such a case equity might interfere.

Plainly, there is no similarity between those cases and this case in which two complainants, operating in different parts of the city and furnishing practically all the street railway service for the city of Chicago, claim the right to maintain a suit in equity to settle the question of the validity of this ordinance for the reason that there are other persons and corporations operating lines of street railway in outlying districts, where perhaps the difficulty is not so much to prevent overcrowding cars as to fill them with passengers. So far as appears from the bill, the only real dispute is between the two complainants and the defendant, and the rights and interests of numerous parties are not involved.

The decree of the circuit court is reversed, and the bill dismissed. Bill dismissed.<sup>3</sup>

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### DOBBINS v. CITY OF LOS ANGELES.

Supreme Court of United States, 1904. 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169.

In error to the Supreme Court of the state of California to review a judgment which affirmed a judgment of the superior court in and for the county of Los Angeles in that state dismissing a bill to enjoin the enforcement of a municipal ordinance prohibiting the erection or maintenance of gasworks except within certain prescribed limits. Reversed and remanded for further proceedings.

See same case below, 139 Cal. 179, 72 Pac. 970, 96 Am. St. Rep. 95.

Plaintiff in error filed a bill of complaint against the city of Los Angeles, seeking an injunction to restrain the enforcement of certain ordinances prohibiting the erection or maintenance of gasworks except within prescribed limits in said city.

The case was decided upon demurrer to the bill. The complaint sets forth, in substance: That on August 26, 1901, the city council of Los Angeles adopted an ordinance making it unlawful to erect and maintain gasworks outside of a certain district described in the ordinance, and fixing penalties for the violation thereof. While this ordinance was in force the plaintiff in error made a contract with the Valley Gas & Fuel Company for the erection of certain gasworks upon territory to be thereafter designated by her, and on

<sup>3</sup> See McQuillin, *Municipal Ordinances*, § 285; also *Kearney v. Canton* 273 Ill. 507, 113 N. E. 98 (1916).

See *Delaney v. Flood*, 183 N. Y. 323, 76 N. E. 209, 2 L. R. A. (N. S.) 678, 111 Am. St. Rep. 759 (1906), injunction refused to restrain police authorities from stationing officers near place alleged to be kept for illegal purpose.



September 28, 1901, purchased lands within the limits of the privileged district as fixed by the ordinance. That on the 22d of November, 1901, upon application to the board of fire commissioners of the city of Los Angeles, that body granted to the plaintiff in error the privilege to erect the gasworks upon the territory aforesaid. Thereupon the plaintiff in error directed the Valley Gas & Fuel Company to proceed with the erection of the works upon the premises so purchased. That the foundations were constructed at a cost of upwards of \$2,500. After the foundations had been nearly completed the city council, on November 25, 1901, passed a second ordinance, amending the first ordinance, and thereby so limiting the boundaries of the territory within which the erection of gasworks was permitted in said city as to include the premises of the plaintiff in error within the prohibited territory. The work of constructing the works was continuously prosecuted until the latter part of February, 1902, when the plaintiff in error alleges that the city of Los Angeles, combining and confederating with one James R. C. Burton and other persons unknown, caused certain employés of the company engaged in the erection of said works to be arrested, charged with the violation of the said city ordinance. Other arrests were made on the 1st and 3d of March, 1902. On the 3d of March, 1902, the city council passed a third ordinance, amending the ordinance of November 25, 1901, in respect to the description of the district within which gasworks could be erected. On March 6, 1902, the city caused the arrest of certain persons employed by the company in charge of the erection of the works, charged with the violation of the amended city ordinance.

It is averred that the adoption by the city council of the ordinances aforesaid, and the attempted enforcement thereof, were instigated by officers and agents of the Los Angeles Lighting Company, a corporation engaged in manufacturing and supplying gas in said city, and having a monopoly of said business therein. It is further averred that the action of the municipal authorities complained of was taken for the purpose of protecting the said Los Angeles Lighting Company in the enjoyment of its monopoly. It is also claimed that the territory surrounding the premises of the plaintiff in error, and within which, under the ordinance of August 26, in force when the complainant made her purchase and located and began the erection of the gasworks, it was lawful so to do, and which, by the amending ordinances, was added to the prohibited territory, was and is a district devoted almost exclusively to manufacturing enterprises. Within its boundaries there is a large amount of vacant and unoccupied land which is and will continue to be useless except for the erection of manufacturing establishments; within which were located at that time a soap factory, a wool-pulling factory, three wineries, numerous oil wells in operation, iron foundry, brass foundry, oil refinery; immediately east of said tract, railroads and an extensive

tannery; immediately north, the oil tanks and refinery of the Standard Oil Company. That the works being constructed for the plaintiff in error are to be built upon concrete foundations with a superstructure of noncombustible material, so that there can be no danger from explosion, bursting, or leaking. The machinery is to be of the most approved pattern; and that there can be no leakage or escape of odors or any interference with the health, comfort, or safety of the inhabitants of the city.

The plaintiff in error relying upon the protection of the fourteenth amendment to the Constitution of the United States, prays that the permit granted by the board of fire commissioners be declared to be a valid and subsisting contract between the city of Los Angeles and herself, and that all ordinances passed by the city council in contravention thereof be declared void; that the defendant be enjoined from enforcing said ordinances against the plaintiff, from delaying or interfering with the action of the plaintiff in erecting the said works, from interfering with the maintenance and operation of the same, and for general relief.

DAY, J. As this case was decided upon demurrer to the complaint, the allegations thereof must be taken as true. The question presented involves the right of the plaintiff in error to invoke the protection of the fourteenth amendment against alleged infraction of her rights by the action of the city council in passing and enforcing the ordinances which prevent the carrying on of the business of making and selling gas to the people of the city. \* \* \*

In this case we think the allegations of the bill disclose such character of territory, such sudden and unexplained change of its limits after the plaintiff in error had purchased the property and gone forward with the erection of the works, as to bring it within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the fourteenth amendment to the federal Constitution.

It is also urged by the defendants in error that a court of equity will not enjoin prosecution of a criminal case; but, as we have seen, the plaintiff in error in this case had acquired property rights which, by the enforcement of the ordinances in question, would be destroyed and rendered worthless. If the allegations of the bill be taken as true, she had the right to proceed with the prosecution of the work without interference by the city authorities in the form of arrest and prosecution of those in her employ.

It is well settled that, where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity. *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207-218, 23 Sup. Ct. 498, 47 L. Ed. 778-780, and cases therein cited.

Upon the whole case, we are of opinion that the demurrer should have been overruled and the city of Los Angeles put upon its answer.

For the reasons herein stated, the judgment of the Supreme Court of California is reversed, and the cause remanded to that court for further proceedings not in conflict with this opinion.<sup>4</sup>

<sup>4</sup> See, also, as to enjoining the collection of penalties, *Wadley Southern R. Co. v. Georgia*, 235 U. S. 651, 35 S. Ct. 214, 59 L. Ed. 405 (1915).

"We cannot agree with counsel for the appellee that a court of equity has no jurisdiction to restrain the appellee [mayor and city council of Baltimore] in the enforcement of the ordinance in question, even though it may be conceded to be invalid, and that its execution would affect injuriously the rights of the appellant and others. In *Page's Case*, 34 Md. 558 (1871), and in *Holland's Case*, 11 Md. 189, 69 Am. Dec. 195 (1857), and in other cases, we have said that 'where an ordinance is void, and its provisions are about to be enforced, any party whose interests are to be injuriously affected thereby may, and properly ought to, go into a court of equity and have the execution of the ordinance stayed by injunction.' " *Deems v. Baltimore*, 80 Md. 164, 30 Atl. 649, 26 L. R. A. 541, 45 Am. St. Rep. 339 (1894).

An injunction will not be granted against the enactment of an ordinance. *McQuillin, Municipal Ordinances*, § 163; *Stevens v. St. Mary's Training School*, 144 Ill. 336, 32 N. E. 962, 18 L. R. A. 832, 36 Am. St. Rep. 438 (1893). See *State ex rel. Rose v. Superior Court of Milwaukee County*, 105 Wis. 651, 677, 678, 81 N. W. 1046, 48 L. R. A. 819 (1900).

Injunctions to restrain boards of health and other sanitary authorities have been granted: (1) Where the proposed action of the board threatened to create a nuisance. *Baltimore v. Fairfield Improvement Co.*, 87 Md. 352, 39 Atl. 1081, 40 L. R. A. 494, 67 Am. St. Rep. 344 (1891); *Upjohn v. Richland Bd. of Health*, 46 Mich. 542, 9 N. W. 845, 41 Am. St. Rep. 178 (1881); *Thompson v. Kimbrough*, 23 Tex. Civ. App. 350, 57 S. W. 328 (1900). (2) Where the sanitary authority proposed to act beyond its jurisdiction. *Hoffman v. Schultz*, 31 How. Proc. (N. Y.) 385 (1866). (3) Where the summary abatement of property was threatened. *Babcock v. Buffalo*, 56 N. Y. 268 (1874); *Rogers v. Barker*, 31 Barb. (N. Y.) 447 (1860); *Clark v. Syracuse*, 13 Barb. (N. Y.) 32 (1852). (4) Where jurisdictional requirements have not been observed, especially that of notice and hearing. *Eddy v. Bd. of Health*, 10 Phila. (Pa.) 94 (1873); *Weil v. Ricord*, 26 N. J. Eq. 169 (1873). (5) Where they act fraudulently or oppressively. *Chase v. Middleton*, 123 Mich. 647, 82 N. W. 612 (1900).

On the other hand, it has been said that there is no power to inquire into the question whether there is a nuisance, and to enjoin the board of health if it should turn out that in the judgment of the court there is none. *Stone v. Heath*, 179 Mass. 385, 60 N. E. 975 (1901).



SECTION 47.—SAME—TO RESTRAIN THE ASSESSMENT  
AND COLLECTION OF TAXESPITTSBURG, ETC., RY. v. BOARD OF PUBLIC WORKS OF  
WEST VIRGINIA.

Supreme Court of United States, 1898. 172 U. S. 32, 19 Sup. Ct. 90, 43  
L. Ed. 354.

Mr. Justice GRAY delivered the opinion of the court.

The collection of taxes assessed under the authority of a state is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction. *Dows v. Chicago*, 11 Wall. 108, 20 L. Ed. 65; *Hannewinkle v. Georgetown*, 15 Wall. 547, 21 L. Ed. 231; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Union Pacific Ry. v. Cheyenne*, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098; *Milwaukee v. Koeffler*, 116 U. S. 219, 6 Sup. Ct. 372, 29 L. Ed. 612; *Shelton v. Platt*, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273.

In *Dows v. Chicago*, a citizen of the state of New York, owning shares in a national bank organized and doing business in the city of Chicago, filed a bill in equity, in the Circuit Court of the United States for the Northern District of Illinois, to restrain the collection of a tax assessed by the city of Chicago upon his shares in the bank, alleging, among other things, that the tax was illegal and void, because the tax was not uniform and equal with taxes on other property, as required by the Constitution of the state, and because the shares were taxable only at the domicile of the owner, and therefore were not property within the jurisdiction of the state of Illinois. This court, speaking by Mr. Justice Field, without considering the validity of the objections to the tax, held that the bill could not be maintained, saying: "Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive remedy of injunction can be invoked. It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of

them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of the government, and thereby cause serious detriment to the public. No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law." 11 Wall. 109, 110, 20 L. Ed. 65. "The party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action." 11 Wall. 112, 20 L. Ed. 65.

In the State Railroad Tax Cases, this court, in a careful and thorough opinion delivered by Mr. Justice Miller, stated that "it has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves, give the right to an injunction in a court of equity," referred to section 3224 of the Revised Statutes (U. S. Comp. St. 1901, p. 2088), which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," and said that, "though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the government depends for its continued existence." The court then quoted from *Dows v. Chicago and Hannewinkle v. Georgetown*, above cited, and proceeded as follows: "We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes. But we may say that, in addition to illegality, hardship or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax. One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is that it has no power to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the state. These functions are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the Constitutions

of all the states, and by the theory of our English origin, is exclusively legislative. A court of equity is, therefore, hampered in the exercise of its jurisdiction by the necessity of enjoining the tax complained of, in whole or in part, without any power of doing complete justice by making, or causing to be made, a new assessment on any principle it may decide to be the right one.<sup>5</sup> In this manner, it may, by enjoining the levy, enable the complainant to escape wholly the tax for the period of time complained of, though it be obvious that he ought to pay a tax if imposed in the proper manner." 92 U. S. 613-615, 23 L. Ed. 663.

In *Union Pacific Railway Co. v. Cheyenne*, in which the Union Pacific Railway Company obtained an injunction against the levy of a tax by the city of Cheyenne, the facts were peculiar. The plaintiff, owning many lots of land in that city, had paid a tax assessed on all its property by a board of equalization under a general statute of the territory of Wyoming, and had also been taxed by the city of Cheyenne under provisions of its charter which had been repealed by that statute; and the bill showed, as stated in the opinion, that the levy complained of "would involve the plaintiff in a multiplicity of suits as to the title of lots laid out and being sold; would prevent their sale, and would cloud the title to all its real estate." 113 U. S. 526, 527, 5 Sup. Ct. 601, 606, 28 L. Ed. 1098. \* \* \*

<sup>5</sup> Compare remarks of Cooley, J., on advantages of injunction in tax proceedings, in *Whitbeck v. Hudson*, 50 Mich. 86, 88, 14 N. W. 708 (1883).

<sup>6</sup> In the case last cited (*Union Pacific Railway Co. v. Cheyenne*, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098 [1885]) the court says: "It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such a sale could be made would be a grievance which would entitle him to go into a court of equity for relief. Judge Cooley fairly sums up the law on this subject as follows: 'To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, cannot, of themselves, furnish any ground for equitable interposition. In ordinary cases a party must find his remedy in the courts of law, and it is not to be supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident, or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief may demand other remedies than those the common law can give, and these in proper case, may be afforded in courts of equity.' This statement is in general accordance with the decisions of this court, as well as of many state courts. *Dows v. Chicago*, 11 Wall. 108, 109, 20 L. Ed. 65 (1870); *Hannewinkle v. Georgetown*, 15 Wall. 547, 549, 21 L. Ed. 231 (1872); *State Railroad Tax Cases*, 92 U. S. 575, 612, 613, 23 L. Ed. 663 (1875), and cases there cited. In *Cummings v. National Bank*, 101 U. S. 153, 156, 25 L. Ed. 903 (1879), where



the bank filed a bill to prevent the collection of a tax wrongfully assessed by the state against the shares of its stockholders, and which the bank was required to pay, we held that the fiduciary character in which the bank stood to its stockholders entitled it to come into a court of equity for relief. In the same case the fact that a like remedy by injunction was given to parties in the state court was regarded as entitled to much weight, and it was further held that where a rule or system of valuation was adopted by the state board of assessment, calculated to operate unequally, and to violate the Constitution of the state, and applicable to a large class of individuals, or corporations, equity might properly interfere to restrain the operation of such unconstitutional exercise of power. And in *Litchfield v. Webster County*, 101 U. S. 773, 779, 25 L. Ed. 925 (1879), we held that a court of equity might relieve against an excessive rate of interest on taxes in arrear, which was really in the nature of a penalty, and which the state could not fairly and equitably demand, having itself claimed title to the property taxed. These authorities are sufficient to illustrate the rules by which courts of equity should be governed in assuming jurisdiction of suits brought to arrest the collection of illegal taxes. We think that the allegations of the bill in this case bring it fairly within the jurisdiction of the court. It shows that it would involve the plaintiff in a multiplicity of suits as to the title of lots laid out and being sold, would prevent their sale, and would cloud the title to all its real estate. We think that these results are sufficiently apparent, and render it unnecessary to look farther." 113 U. S. 525-527, 5 Sup. Ct. 605-606, 28 L. Ed. 1098 (1885).

"If there was no right to assess the particular thing at all, \* \* \* an assessment under such circumstances would be void, and, of course, no payment or tender of any amount would be necessary before seeking an injunction." *People's National Bank v. Marye*, 191 U. S. 272, 281, 24 Sup. Ct. 68, 71, 48 L. Ed. 180 (1903).

"The assessment being bad, for the reasons which we have stated, the board of tax commissioners acted without jurisdiction, according to the decision of the Supreme Court of Indiana. *Hart v. Smith*, 159 Ind. 182 [64 N. E. 661, 58 L. R. A. 949, 95 Am. St. Rep. 280 (1902)]. We do not abate at all from the strictness of the rule that in general an injunction will not be granted against the collection of taxes. *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663 (1875). But it was recognized in the passage just quoted from *People's National Bank v. Marye* that under the present circumstances a resort to equity may be proper. The course adopted is the same that was taken without criticism from the court in *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 633 (1897). It avoids the necessity of suits against the officers of each of the counties of the state, and we are of opinion that the bill may be maintained. *Union Pacific Ry. v. Cheyenne*, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098 (1885); *Pittsburg, Cincinnati, Chicago & St. Louis Ry. v. Board of Public Works*, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354 (1898)." *Fargo v. Hart*, 193 U. S. 490, 503, 24 Sup. Ct. 498, 501, 48 L. Ed. 761 (1904).

In a number of states there are statutes prohibiting the granting of injunctions to restrain the assessment or collection of taxes. See *Eddy v. Tp. of Lee*, 73 Mich. 123, 40 N. W. 792 (1888); *Laird-Norton Co. v. Pine County*, 72 Minn. 409, 75 N. W. 723 (1898). But these statutes do not control the equitable jurisdiction of the federal courts. *Taylor v. Louisville & N. R. Co.*, 88 Fed. 350, 31 C. C. A. 537 (1898). As to federal taxes, see U. S. Rev. St. § 3224 (26 USCA § 154; U. S. Comp. St. § 5947), referred to in the principal case.

## TAYLOR et al. v. LOUISVILLE &amp; N. R. CO.

Circuit Court of Appeals of United States, Sixth Circuit, 1898. 88 Fed. 350, 31 C. C. A. 537.

Bill in equity against Taylor, Morgan, and Craig, who constitute the board of equalization of the state of Tennessee, to enjoin them from certifying in accordance with the act of the Legislature of Tennessee passed April 5, 1897, a tax valuation upon complainant's railroad in Tennessee, to be apportioned by the State Comptroller to the thirty-five counties, cities, and towns in which the road lies.

TAFT, Circuit Judge. \* \* \* The next objection to the assessment of the defendants, and the most serious, is that they have assessed the railroad property of the state, including that of complainant, at its real value, whereas all other property of the state is habitually and intentionally assessed by the assessing officers, who are not the defendants, at not exceeding 75 per cent. of its real or correct value. We think it clear, from the provisions of the railroad assessment act of 1897, that neither board thereby created is charged with any duty to equalize the taxable value of real estate with that of railroad property. The board of equalization under the act of 1897 is made up of the same state officers who composed the state board of examiners under the prior act, and they were charged with the duty of revising the assessment of railroads made by the board of assessors and equalizers created by the act of 1895; but they had no revisory duty connected with that board's equalization of real estate throughout the state. Hence when, in 1897, the board of assessors and equalizers was abolished, the equalization of real estate values was abolished. The continuation of the state board of examiners under the new name of the "Board of Equalization" could have no effect to continue in force provisions of law as to state equalization of values of real estate, because that board never had any duty connected with the assessment of real estate at all. It is also clear that the act of 1897 commands the two boards created, by its terms, to fix the correct value of the railroad and other property which they assess. This means the real value of the property, and it is conceded that the laws for the assessment of real and personal property impose on the assessing officers the duty of assessing it at the same value.

The contention for the complainant is that the undervaluation of real and personal property is intentional and systematic throughout the state, and is in accordance with an immemorial and well-recognized custom; that, combined with the assessment at full value of all railroad property, the undervaluation of all other property makes a system of taxation operating to impose upon complainant, and all others holding the same class of property, a grossly unjust share of the cost of the state, county, and city governments; that this is in

violation of the Constitution of the state of Tennessee, which enjoins uniformity of taxation, according to value, on all property, and expressly forbids that one species of property shall be taxed higher than any other; and that a court of equity, because it is unable to remedy the glaring injustice done to complainants and others of the same class, by compelling the assessment on other property to be raised to its real value, may accomplish the same result by enjoining the defendants from assessing railroad property at any higher percentage than that at which other property in the state is assessed, although this is a departure from the rule of action prescribed for them in the statute creating them a taxing board. In considering the soundness of this contention, we come first to the facts.

We find from the evidence, which is uncontradicted, that generally, in the state of Tennessee, for a number of years, the assessors and the board of equalization of each county have intended to assess, and have assessed, real and personal property at a uniform percentage less than its real value; that this percentage is not uniform between the counties, but that it is not substantially less than 25 per cent. in any of them. We base our conclusion on 150 affidavits contained in the record. They do not cover specifically more than 35 counties out of the 96 counties in the state; but when they are supplemented by the evidence of the members of the state board of equalizers, who officially investigated the manner of making assessments in each county in the state by actual visits and by correspondence, by examining the assessing officers, and by a comparison of tax values with actual sales, we have no difficulty in finding the fact to be as above stated. The affidavits from different counties are many of them the sworn statements of the assessors and county equalizers themselves, who made the assessments, and leave not the slightest doubt that in each county the undervaluation was systematic, was according to a uniform and well-understood rule of reduction, and was for the purpose of reducing the proportionate burden of the expenses of the state government which the particular county would have to bear. These expenses are, in effect, apportioned to each county in the proportion which its total tax valuation bears to the total tax valuation of all the property in the state. The motive for undervaluation is manifest, and the variation in the percentage, as between the counties, is dependent only on the varying extremes to which taxing officers of different counties are willing to go in departing from the statutory rule to reduce the state burden on their respective counties. We further find that in the year 1897, which is one of the years in respect to which relief is asked in the bill, the assessment of real estate which was not affected by the repeal of the act of 1895 was equalized by the state board of assessors and equalizers, under that act, at a basis of 75 per cent. of its real value; that this was done intentionally, and was adopted as rule of action by that board. This is established by the evidence of two of the three members of the



board, and of the secretary of the board; and although there is a discrepancy in their statements, as to whether the basis fixed was 70 or 75 per cent. (two of them saying that it was 70, and the other 75), the fact that they deliberately fixed a percentage of real value as their basis of assessment is admitted by all of them.

We are relieved from considering the weight of the evidence as to the exact basis by the averment of the bill, which fixes it at 75 per cent. The assessed value of real and personal property, except railroads and telegraph lines, in Tennessee, for the year 1897, was, in round numbers, \$312,000,000. The value of railroads and telegraph lines, as assessed by defendants, was \$63,000,000—an increase of the assessed value of the year before of \$25,000,000. This makes a total tax value of \$375,000,000, and imposes on the railroads  $\frac{63}{375}$ , or about  $\frac{1}{6}$  of the entire burden of the state, county, and municipal governments. If the assessment of the real and personal property were increased to actual value, it would be \$416,000,000, and the share of the railroads in paying governmental expenses would be a little less than  $\frac{1}{8}$  of the whole. The existence of this glaring inequality no evidence has been introduced to contradict. The defendants have been content to deny it in a general way in their answer, and have adduced no testimony upon the point from any one professing to have specific knowledge on the subject.

The Constitution of Tennessee, adopted in 1870 (article 2, § 28) provides that: "All property—real, personal and mixed—shall be taxed. \* \* \* All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value." \* \* \*

There has been much discussion at the bar upon the point whether the Constitution of 1870 requires that all property shall be assessed at its full value, or whether it would satisfy the Constitution if the taxing laws required all property to be assessed for taxation at a uniform percentage—say 75 per cent. of its real value. Language has been quoted from the opinions of judges of the Supreme Court of Tennessee supporting the former view, but they were obiter, and wholly unnecessary to the decision of the cases before the court. Mayor, etc., of Chattanooga v. Nashville, C. & St. L. R. Co., 7 Lea, 569; Brown v. Greer, 3 Head, 696. Speaking for Judge LURTON and myself, we should be inclined to hold that any legislative system of tax assessment of property based on a uniform percentage of its value would be "according to its value," and would be a compliance with the constitutional mandate. This is, we think, in accordance with the latest expression from the Supreme Court of Tennessee in the Reelfoot Lake Levee District Case, already quoted [97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725]. Judge SEVERENS doubts, and

the difference is not material, for we are unanimously of opinion that the question is not controlling in this case. The Constitution expressly gives the Legislature the power to prescribe that all property shall be assessed at its true value, and the Legislature has done so. Such a legislative command is as binding on those whom it affects as if it were in the Constitution, because passed in pursuance of the fundamental law; and counsel for complainant do not avoid the difficulty which confronts them in the case, to wit, that they are seeking to enjoin defendants from doing that which the letter of the law requires the defendants to do, by showing that the requirement is in a constitutionally enacted statute, rather than in the Constitution itself.

The sole and manifest purpose of the Constitution was to secure uniformity and equality of burden upon all the property in the state. As a means of doing so (conceding that defendant's construction is the correct one), it provided that the assessment should be according to its true value. It emphasized the object of the section by expressly providing that no species of property should be taxed higher than any other species. We have before us a case in which the complaining taxpayer, and other taxpayers owning the same species of property, are taxed at a higher rate than the owners of other species of property. This does not come about by legislative discrimination, but by the intentional and systematic disregard of the law by those charged with the duty of assessing all other species of property than that owned by complainant and its fellows of the same class. This is a flagrant violation of the clause of the Constitution forbidding discrimination in taxation between different species of property. That clause is self-executing. *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 160, 36 S. W. 1043, 34 L. R. A. 725. How is it to be remedied? It is said on behalf of the defendants that the only method consistent with the Constitution is by raising the assessments of the real and personal property. This is no remedy at all. It has been suggested (but we cannot regard the suggestion as a serious one) that the railroad companies of the state should go before the taxing authorities of each county, and, after notifying each taxpayer, attempt to secure an increase in the total tax assessment of the real and personal property of the state from \$312,000,000 to \$416,000,000. The absolute futility of such a course, the enormous expense, and the length of time necessary in attempting to follow it, need no comment.

The question presented is, then, whether, when the sole object of an article of the Constitution is being flagrantly defeated, to the gross pecuniary injury of a class of litigants, and one of them appeals to a court of equity for relief, it must be withheld because the only mode of granting it will involve an apparent departure from the method marked out by the Constitution and the law for attaining its sole object. We say "apparent" departure from the consti-

tutional method, because that instrument contemplated a system in which all property should be assessed at its real value. It did not intend that a large part should be assessed at 75 per cent., and a smaller part at 100 per cent. The method of assessing one species of property cannot be truly said to be constitutional, without having regard to that pursued with other species; for the essence of the constitutional requirement is uniformity, and uniformity cannot be affirmed to exist without a due regard to the methods of assessing all species. Therefore, to enjoin the enforcement of the prescribed method of assessment as to one species of property, when there is a departure from it as to all others, if the injunction secures uniformity as to all, is not so great a violation of the method really prescribed as that involved in a continuance of the existing conditions, and the denial of relief to the injured taxpayer. The court is placed in a dilemma, from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the Constitution. To hold otherwise is to make the restrictions of the Constitution instruments for defeating the very purpose they were intended to subserve. It is to stick in the bark, and to be blind to the substance of things. It is to sacrifice justice to its incident. The same dilemma has been presented to other courts. They have not always taken the same horn. There is a conflict of authority, but we are glad to say that the adjudications of that court whose decision we must follow support the views we have above expressed. Before examining the cases in the Supreme Court of the United States, let us refer to the decisions of some of the state courts upon the question:

In *Randell v. City of Bridgeport*, 63 Conn. 321, 28 Atl. 523, the case came into court on a direct appeal from the action of a board of equalization, called the "Board of Relief of the City of Bridgeport." The superior court found as a fact that it had been the uniform rule of the board of assessors and the board of relief of that city to value all property, for the purpose of taxation, at one-half of its fair market value. The court found that the plaintiff's property was assessed at its full market value as the statute required. The Supreme Court held that the complainant was entitled to an assessment of one-half the real value of his property, and this in the face of a mandatory provision of the statute that all property should be assessed at its true value. \* \* \*

In *Cocheco Co. v. Strafford*, 51 N. H. 455, the law provided that the selectmen should appraise all taxable property at its full and true value in money. The statute further provided that the court should make such order thereon as justice required. Mr. Justice Doe, upon this point, in a concurring opinion, said: "Justice requires an equal rate of taxation of Strafford real estate. If the Strafford real estate of others was appraised in 1870 at a less rate than its full value, the



real estate of the plaintiffs should be appraised by the commissioners at the same rate, so that the plaintiffs shall pay their proportion of tax and no more. The usual rate in farming towns is well understood, and the practice of undervaluation is so universal as to raise a presumption of fact that it prevails in Strafford. When the commissioners have ascertained the fact of the full value of the plaintiffs' Strafford real estate on the 1st day of April, 1870, they should proceed further, and appraise it at its value as compared with the value at which other Strafford real estate was appraised by the selectmen in 1870. This comparative value is the only question which the commissioners are appointed to decide, and is a pure question of fact."

This language was approved in *Manchester Mills v. Manchester*, 58 N. H. 38, on a petition for the abatement of the real estate tax, in which the court appointed a committee to find and report—First, the true value of the plaintiff's estate; and, second, the true value of real estate of Manchester, other than plaintiff's compared with its assessed value. The question whether the second point was a proper subject for inquiry came before the court, and it was held that it was a proper subject of inquiry, and that the abatement should proceed on the findings made upon such inquiry.

[The opinion then cites, and quotes from, *Ex parte Ft. Smith & Van Buren Bridge Co.*, 62 Ark. 461, 36 S. W. 1060. This part of the opinion is omitted.]

In the case of *Board of Sup'rs of Bureau Co. v. Chicago, B. & Q. R. Co.*, 44 Ill. 229, the appeal was a direct appeal from the board of supervisors, which assessed the value of the property of the railroad company. It appeared that the valuation of property of individuals, except that of the railroad company ranged from one-fifth to one-third, while that of the railroad company ranged from one-third to one-half; and the appellate court decided that the assessment of the railroad property must be at the same percentage of the real value as that of individuals. The Constitution of Illinois required the general assembly to provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property; such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct, and not otherwise. The act to carry out this section provided that each separate parcel should be valued at its true value in money. The court held that it was the duty of the supervisors to impose the same percentage of assessment upon the railroad company as had been assessed by the assessors upon the property of individuals.

[The opinion then cites and quotes from *Chicago, B. & Q. R. Co. v. Board of Com'rs of Atchison Co.*, 54 Kan. 781, 39 Pac. 1039. This part of the opinion is omitted.]

As has already been said, there are cases in which the other horn of the dilemma has been taken, the injustice to the complaining class

of taxpayers has been allowed to continue, and the violation of constitutional or statutory uniformity and equality has gone on unhindered, in order that the letter of the law may be preserved while its spirit is flagrantly broken. *Wagoner v. Loomis*, 37 Ohio St. 571; *Central R. Co. v. State Board of Assessors*, 48 N. J. Law, 1, 2 Atl. 789, 57 Am. Rep. 516. See, also, *City of Lowell v. County Com'rs*, 152 Mass. 372, 25 N. E. 469.

We are relieved from a further discussion of the question by the decision of the Supreme Court of the United States in the case of *Cummings v. Bank*, 101 U. S. 153, 25 L. Ed. 903. In that case the assessors of real property, the assessors of personal property, and the county auditor (who was the assessing officer of the first instance for bank shares) of the county where the complainant bank was situated agreed to assess real and personal property at one-third its value, and money or invested capital at six-tenths its value. This agreement was in violation of the statutes under which they were acting, which required assessments to be at the true value in money. The state board of equalization for banks increased the assessment of complainant's bank shares to their full market value. The state board had no power to equalize bank shares with real or personal property, and, in assessing these bank shares at their full value, it was following the exact course prescribed by statute, and the statute was passed in accordance with the Constitution of Ohio, which requires the Legislature to pass laws taxing all property "by uniform rule at its true value in money." This action was brought by the complainant bank to enjoin the county treasurer from collecting the tax on the assessment against its shares which had been certified down by the state board of assessors. The Circuit Court of the United States enjoined the treasurer from collecting tax on a valuation greater than one-third of the real value of the shares. The effect of this order was to annul an assessment by the state board of equalization which was strictly in accordance with the letter of the statute governing it in the discharge of its duties, and which was equally in accord with the standard of value for assessment fixed by the Constitution of the state. The decree of the Circuit Court was affirmed by the Supreme Court on the principle stated by the court as follows: "When a rule or system of valuation is adopted, by those whose duty it is to make the assessment, which is designed to operate unequally, and to violate a fundamental principle of the Constitution, and when the rule is applied, not solely to one individual, but to a large class of individuals or corporations, [that] equity may properly interfere to restrain the operation of this unconstitutional exercise of power." \* \* \*

The justice [Mr. Justice Miller] discussed the facts, to show that the laws had been unfaithfully administered by those charged with their execution, and that as the only method provided in the system by which constitutional uniformity was to be secured, namely, by taxing all property at its true value in money, though required by statute, had been departed from by the administrators of the law in

assessing other classes of property than that held by the complainant, equity might relieve complainant from his unequal burden thus placed on him by enjoining taxation on more than one-third of the assessment against him, though his property had been only taxed at its true value. After commenting on the widespread custom or rule in many states to undervalue real estate, growing out of the effort of the landowner to produce something like equality of burden with personal property which escapes taxation by being hidden, the justice concluded: "But whatever may be its cause, when it is recognized as the source of manifest injustice to a large class of property, around which the Constitution of the state has thrown the protection of uniformity of taxation and equality of burden, the rule must be held void, and the injustice produced under it must be remedied, so far as the judicial power can give remedy."

The case before us cannot in any material respect be distinguished from the *Cummings Case*. In this case, as in that, the injunction sought is against the enforcement of an assessment upon complainant's property which was made at the true value of the property, in accordance with the mandate of the Constitution and statute, by assessing officers who had not themselves discriminated against complainant's property by undervaluing other species of property, and who were not themselves guilty of any fraud. In this case, as in that, the unjust operation of the assessment grows out of the systematic and intentional undervaluation of other species of property by assessors who are not responsible for the assessment complained of. In this case, as in that, the effect of the injunction is to compel certain assessors of the state to reduce their assessment to the illegal standard of valuation adopted by different and unfaithful assessors of other species of property, and is justified by the result that in this way is secured something like the uniformity which is the sole purpose of the Constitution. It has been pressed upon us that no such preconcert of action by the assessing officers, and no such uniform rule of undervaluation, have been shown in this case as appeared in the *Cummings Case*, and that upon these circumstances the *Cummings Case* turned. We have already found, from the evidence, that there is an intentional undervaluation of property in each county, and that this is uniform as to all real and personal property, and results from a clear understanding between the assessors and county boards of equalization, who have a common motive for the reduction. More than this, it is clearly shown that the state board of assessors and equalizers in 1896 intentionally equalized all real estate in the state at 75 per cent. of its true value for the taxation of the year 1897. Could preconcert be clearer than this?

It is further said that, before the remedy pursued in the *Cummings Case* can become applicable, it must appear that the undervaluation of one species of property was adopted as a rule of action by the assessors for the fraudulent purpose of discriminating against the



complaining taxpayer and his class, and that no such case is presented to this court. Now, it is true that, before equity will relieve in such a case, it must appear that the assessing officers whose acts of undervaluation create the unjust burden must intentionally and habitually violate the law, by assessing property at a less valuation than that which they know to be its true value; but it is not true that they must be shown affirmatively to intend to injure complainant and his class of taxpayers in so doing. It is true that in the *Cummings Case* the unfaithful assessors, or some of them, did undervalue both real and personal property, and money capital, in which were included bank shares, at different percentages of their true value; but the assessment of which complaint was made was not the work of these assessors at all, but, as here, of a state board of equalization. An intentional undervaluation of a large class of property, when the law enjoins assessment at true value, is necessarily designed to operate unequally upon other classes of property to be assessed by other taxing tribunals, who, it may be presumed, will conform to the law. In the case at bar the county assessors and board of equalization of each county have been actuated in their violations of the law by the desire to reduce, as far as may be, their county's share of the state burdens. Their undervaluations of property have been uniform as to all property in their county but railroads. They could not but know that such undervaluation must work an injustice against the property of railroads, if assessed at its true value by a state board, and taxed for county and state purposes on that basis. In this sense, the rule of undervaluations adopted in each county is necessarily "designed to operate unequally," within the meaning of Mr. Justice Miller in the *Cummings Case*. The ratio decidendi of that case is to be gathered from the facts, and the language of the opinion is to be interpreted in the view of the facts. The case has been commented on by the Supreme Court in a number of subsequent cases, but it has never been modified or overruled.\*

[The court then cites and quotes from *Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469, *Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044, *Stanley v. Supervisors*, 121 U. S. 550, 7 Sup. Ct. 1234, 30 L. Ed. 1000, and *Bank v. Perea*, 147 U. S. 87, 13 Sup. Ct. 194, 37 L. Ed. 91.]

We find nothing in these cases which should change our view, already expressed, of the effect of the *Cummings Case*. They merely emphasize the point that equity will not relieve against an assessment merely because it happens to be at a higher rate than that of other property; that such inequalities, due to mistake, to the fallibility of human judgment, or to other accidental causes, must be borne, for the reason that absolute uniformity cannot be obtain-

\* But see *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 38 S. Ct. 495, 62 L. Ed. 1154 (1918).

ed; that, in other words, what may be called "sporadic cases of discrimination" cannot be remedied by the chancellor. He can only interfere when it is made clear that there is, with respect to certain species of property, systematic, intentional, and unlawful undervaluations for taxation by the taxing officers, which necessarily effect an unjust discrimination against the species of property of which the complainant is an owner. The reason for the distinction is obvious. The occasional and accidental discriminations are inevitable in every assessment, and are not likely to continue, because not the result of an illegal purpose on the part of any one. If equitable interference in such cases could be invoked, the obstruction to the collection of taxes would be so frequent as to be intolerable. More than this, an action to enjoin a tax is a collateral attack upon the judgment of a quasi judicial tribunal; and it cannot be justified except on the ground of an obvious violation of law, or something equivalent to fraud. It does not lie where the injury complained of arises only from the erroneous, but honest, judgment of the lawfully constituted tax tribunal.

The interference by the chancellor in the case at bar and in the *Cummings* Case rests on something equivalent to fraud in the tribunal imposing the tax. The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as one judgment. If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully-assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from fault of fraud or intentional discrimination. Therefore the injunction might issue against the assessment upon the fully-assessed property, as void altogether, until a new and uniform assessment upon all property according to law could be made. And such is the rule in some courts. *Weeks v. Milwaukee*, 10 Wis. 263; *Hersey v. Board*, 16 Wis. 192, 82 Am. Dec. 713; *Smith v. Smith*, 19 Wis. 619, 88 Am. Dec. 707. The inequity of allowing the taxpayer to escape altogether, and the intolerable inconvenience to the public in the delay incident to such a course, however, lead a court of equity to shape its order so as to allow only so much of the fraudulent judgment to be enforced against the complainant as may be done without imposing on him any inequality of tax burden.

We reach the conclusion, therefore, that the Circuit Court was right in enjoining the unjust, unequal, and (in the sense already explained) fraudulent assessment against the complainant; but we think the order should have required, as a condition of the issuing of the injunction,

that the complainant should pay to the proper officers a tax upon the 75 per cent. of the assessment made by defendants. The evidence, taken with the averments of the bill, does not establish that the discrimination against the complainant's property really exceeds this. The condition imposed by the Circuit Court was the payment of the taxes on the assessment for 1897 by the state board of assessors and equalizers. That assessment, as we have found, was annulled by the act of 1897.

The order of the court is that the order of injunction be modified as above stated, and that, as thus modified, it be affirmed, at the costs of the appellants.<sup>7</sup>

<sup>7</sup> Other cases in this collection illustrating the appeal to the courts for relief against administrative action in the matter of taxation and revenue: Action against officer: *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145 (1816); *Chegaray v. Jenkins*, 5 N. Y. 376 (1851); *Tracy v. Swartwout*, 10 Pet. 80, 9 L. Ed. 354 (1836); *Elliott v. Swartwout*, 10 Pet. 137, 9 L. Ed. 373 (1836); action against municipality: *Lincoln v. Worcester*, 8 Cush. (Mass.) 55 (1851); *Falls v. Cairo*, 58 Ill. 403 (1871); *Ætna Insur. Co. v. Mayor*, 153 N. Y. 331, 47 N. E. 593 (1897); *Dooley v. United States*, 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074 (1901); certiorari: *People v. Board of Assessors*, 39 N. Y. 81 (1868); *Tomlinson v. Board of Equalization*, 88 Tenn. 1, 12 S. W. 414, 6 L. R. A. 207 (1889); injunction: *Cleveland, etc., R. Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. Ed. 1041 (1894); *Pittsburgh, etc., R. Co. v. Board of Public Works*, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354 (1898); *Huling v. Ehrich* 183 Ill. 315, 55 N. E. 636 (1899); defense against enforcement: *Hagar v. Reclamation District*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569 (1884).

See *Weber v. Baird*, 208 Ill. 209, 70 N. E. 231 (1904): "We think a court of equity may revise the decision of the board of review assessing property to a taxpayer as having been owned by him and subject to taxation and omitted from the schedule prepared by him. The manner in which the board of review conducts its investigation is such that the taxpayer is not advised of the proofs heard or information obtained by the board relative to the ownership by him of property said to have been omitted from the schedule, nor has he an opportunity to contest the truth of such proof or such information before the board. He cannot appeal from any decision of the board, other than from a decision that certain property is not exempt from assessment for taxation. *Dutton v. Board of Review*, 188 Ill. 386, 58 N. E. 953. Equity will therefore afford a remedy, and hear and determine whether the board correctly decided that the taxpayer was the owner of the property which the board assessed against him as having been omitted by him from his schedule. The inquiry in such an equitable proceeding is, what property did the board decide the taxpayer owned and had omitted from his schedule, and did he own that property? What the board decided is to be determined by the record made by the board of its decision. A taxpayer seeking the aid of equity must therefore show the record made by the board, and then he will be heard to show that he did not own the property there specified in the record. If, in fact, the board did not enter its decision on the assessment books, or if its decision did not show on such books the kind and class of property said to have been omitted, such failure would vitiate the assessment, unless in some way cured. But a taxpayer cannot ignore the record made by the board of review, which, if lawfully rendered, would show specifically the property or class of property which the board decided the taxpayer owned and had not listed for assessment, and be allowed to overturn the decision by seeking, in a general way, to deny that he had any other property than that he had listed."

See, also, *Vittum v. People*, 183 Ill. 154, 55 N. E. 689 (1899), assessing too high a rate.

Taxpayers' actions to restrain the illegal, corrupt, or wasteful expenditure of public funds: *Doolittle v. Supervisors of Broome County*, 18 N. Y. 155 (1858), jurisdiction denied. Statute allowing such action: Laws N. Y. 1872, c. 161, now Code Civ. Proc. § 1925. See *Talcott v. Buffalo*, 125 N. Y. 280, 26



## SECTION 48.—INJUNCTION AS SUBSTITUTE FOR MAN- DAMUS

### ILLINOIS BELL TELEPHONE CO. v. COMMERCE COM- MISSION et al.

Supreme Court of Illinois, 1922. 306 Ill. 109, 137 N. E. 449.

CARTWRIGHT, J. The appellant, the Illinois Bell Telephone Company, filed in the circuit court of Sangamon county its bill of, complaint in this case to enjoin the appellees, the Commerce Commission, the members of the Commission, and the Attorney General, from com-

N. E. 263 (1891); General Municipal Law N. Y. 1892, c. 685, § 3; Rev. Laws Mass. c. 25, § 100. Jurisdiction asserted: Colton v. Hanchett, 13 Ill. 615 (1852); New London v. Brainard, 22 Conn. 552 (1853); Crampton v. Zabriskie, 101 U. S. 601, 25 L. Ed. 1070 (1879); but see Frothingham v. Mellon, 262 U. S. 447, 486 (1923).

Actions in equity by public authorities to restrain violation of law by private persons or corporations: Attorney General v. Gt. Northern R. Co., 1 Drew. & S. 154 (1860); Attorney General v. Railroad Companies, 35 Wis. 425 (1874); In re Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. Ed. 1092 (1895); Columbian Athletic Club v. State, 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 727, 52 Am. St. Rep. 407 (1895); Com. ex rel. Pratt v. McGovern, 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280 (1903); State v. Uhrig, 14 Mo. App. 413 (1883); State v. O'Leary, 155 Ind. 526, 58 N. E. 703 (1900); Taunton v. Taylor, 116 Mass. 254, pt. 5 (1874); Village of Waupun v. Moore, 34 Wis. 450, 17 Am. Rep. 446 (1874); Mayor of Davenport Corporation v. Tozer, [1902] 2 Ch. 182; Attorney General v. Ashborne Recreation Grounds Co., [1903] 1 Ch. 101; Inhabitants of Needham v. N. Y. & N. E. R. Co., 152 Mass. 61, 25 N. E. 20 (1890); Metropolitan City Ry. Co. v. Chicago, 96 Ill. 620 (1880).

General City Law of New York, § 223: " \* \* \* The city may maintain an action in a court of competent jurisdiction to restrain by injunction the violation of any ordinance of the common council or of the commissioner in charge of the health department, notwithstanding that an ordinance may provide a penalty for its violation."

The following additional cases in this collection are suits to restrain public officers or bodies: Lingo v. Burford, 112 Mo. 149, 20 S. W. 459 (1892); Pittsburg, C., C. & St. L. R. Co. v. Backus, 154 U. S. 421, 14 S. Ct. 1114, 38 L. Ed. 1031 (1894); State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663 (1875); Huling v. Ehrich, 183 Ill. 315, 155 N. E. 636 (1899); Metropolitan Bd. of Health v. Heister, 37 N. Y. 661 (1868); North American Cold Storage Co. v. Chicago, 211 U. S. 306, 29 S. Ct. 101, 53 L. Ed. 195 (1908); Eckhardt v. Buffalo, 19 App. Div. 1, 46 N. Y. Supp. 204 (1897); Chicago v. Burtice, 24 Ill. 489 (1860); Noble v. Union River Logging R. Co., 147 U. S. 165, 13 S. Ct. 271, 37 L. Ed. 123 (1893); Bates & Guild Co. v. Payne, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894 (1904); Reynolds v. Schultz, 27 N. Y. S. Ct. 282 (1867); Brougham v. Blanton Mfg. Co., 249 U. S. 495, 39 S. Ct. 363, 63 L. Ed. 725 (1919); United States v. New York Central R. Co., 263 U. S. 603, 44 S. Ct. 212, 68 L. Ed. 470 (1924); Felsenthal v. Johnson, 104 Ill. 21 (1882); Tollman v. Salomon, 191 Ill. 202, 60 N. E. 809 (1901); Earl v. Raymond, 188 Ill. 15, 59 N. E. 19 (1900); American Express Co. v. Raymond, 189 Ill. 232, 59 N. E. 528 (1901); Interstate Commerce Com'n v. Louisville & N. R. Co., 227 U. S. 88, 33 S. Ct. 185, 57 L. Ed. 431 (1913). Chicago Junction Case, 264 U. S. 258, 44 S. Ct. 317, 68 L. Ed. 667 (1924); United States v. Abilene & S. R. Co., 265 U. S. 274, 44 S. Ct. 565, 68 L. Ed. 1016 (1924).

mencing any suit or proceeding at law or in equity to enforce the provisions of the Public Utilities Law (Laws 1913, pp. 455, 459) against appellant, its officers or employees, by reason of the appellant charging or collecting the schedule of rates filed with the Public Utilities Commission on April 1, 1920, for local telephone service in the city of Mومence and vicinity, or from doing or performing any act or acts which would prevent or tend to prevent the appellant from charging or collecting said schedule of rates. The defendants filed a general demurrer, which was overruled, and, having elected to stand by their demurrer and refusing to plead further, the court entered a decree as prayed for in the bill of complaint. The Commerce Commission appealed to this court, and the cause was transferred to the Appellate Court for the Third District. *Bell Telephone Co. v. Commerce Com.*, 302 Ill. 468, 134 N. E. 807. The Appellate Court reversed the decree and granted a certificate of importance and an appeal to this court.

The facts alleged and admitted for the purpose of the demurrer are as follows: The complainant is a corporation owning and operating a telephone system, and among other local telephone exchanges owns and operates an exchange situated in the city of Mومence. On April 1, 1920, the Central Union Telephone Company, which then owned and operated the exchange, filed with the Public Utilities Commission a schedule of rates to be effective May 1, 1920, for local telephone service in Mومence and vicinity. On April 19, 1920, the Public Utilities Commission entered an order suspending the effective date of the rates scheduled until August 29, 1920, and on July 28, 1920, the Commission again suspended the effective date of such rates until February 26, 1921. A hearing was held on the rates scheduled on July 1, 1920, and the hearing was continued without date pending an investigation. On or about December 1, 1920, the complainant acquired the Mومence exchange from the Central Union Telephone Company, and on December 7, 1920, it was substituted in the proceedings for the Central Union Telephone Company. On February 18, 1921, the Public Utilities Commission entered an order purporting to extend the period of suspension of the rates to August 26, 1921. On March 3, 1921, a hearing was held before the Public Utilities Commission at which the complainant entered its appearance without prejudice to any right it had by reason of the order of February 18, 1921, and at the conclusion of the hearing the matter was taken under advisement. On July 28, 1921, the Commerce Commission, which had succeeded the Public Utilities Commission, made an order purporting to resuspend the effective date of the rates until February 23, 1922, and on October 31, 1921, the Commission made an order purporting to permanently suspend, annul, and cancel the rates scheduled, filed with the Commission. Neither the Public Utilities Commission nor the Commerce Commission entered any order at any time or made any finding whether the rates scheduled were just and reasonable or not or what would be just and reasonable rates.

The bill contained conclusions of law upon which the complainant founded its application for the injunction and those conclusions sought to be maintained in this court are that a public utility has plenary power to make rates for the service which it offers to the public, subject only to the condition that its rates be just and reasonable; that the Commerce Commission has no power to alter such rates except upon finding them to be unjust and unreasonable; that the Commission has no power to suspend the taking effect of proposed rates beyond 120 days, plus 6 months; that, the Commission having exhausted its power to suspend the effective date of the rates filed, and not having found them unjust and unreasonable, the rates filed became the legal rates at the expiration of the statutory period, and were the lawful rates for the service rendered.

The questions so presented and argued were considered in a similar case, where it was held that the Commission has no authority to make rates in the first instance, but that right lies with the utility; that, to prevent unjust discrimination, undue preferences, and extortionate rates and charges, the Commerce Commission is charged with the duty of establishing just, reasonable and uniform rates; and that on a hearing it is the duty of the Commission to establish the rates or the charges, classifications, contracts, practices, rules, or regulations proposed, in whole or in part, or others in lieu thereof which it shall find to be just and reasonable. *Bell Telephone Co. v. Commerce Com.*, 304 Ill. 357, 136 N. E. 676. The statute gives the public utility the right to apply for a rehearing, and upon a denial of what it conceives to be its right an appeal to the circuit court. If the Commission makes no finding whether the proposed rates are just and reasonable, and fails or refuses to establish rates, the remedy by mandamus is clear, certain, and adequate to compel the performance of the duty imposed by the law. In either event there is no ground for interference by a court of equity where no other ground of equity jurisdiction exists.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

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### SMITH et al. v. ILLINOIS BELL TELEPHONE CO.

Supreme Court of the United States, 1926. 270 U. S. 587, 46 S. Ct. 408, 70 L. Ed. 747.

Appeals from the District Court of the United States for the Southern District of Illinois.

Suits by the Illinois Bell Telephone Company against Frank L. Smith and others, constituting the Illinois Commerce Commission, and Oscar E. Carlstrom, Attorney General of the state of Illinois. From a decree granting a permanent injunction, and from an order previously entered granting an interlocutory injunction, defendants sep-



arately appeal. Appeal from order granting interlocutory injunction dismissed, and decree affirmed.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The telephone company, an Illinois corporation, owns and operates a telephone system in the city of Peoria and vicinity. It brought suit on June 18, 1924, against appellants (members of the state Commerce Commission and Attorney General of the state of Illinois), to enjoin them from enforcing or attempting to enforce a schedule of rates alleged to be confiscatory, and from taking any steps or proceedings against the company by reason of the collection by it of rates and charges under another and higher schedule. A motion to dismiss the bill was overruled, and, upon the bill and attached exhibits and affidavits, appellants refusing to plead further, a permanent injunction in accordance with the prayer was granted by the lower court. The appeal in No. 670 is from that decree.

The appeal in No. 193 is from an order previously entered, granting an interlocutory injunction. A motion to dismiss that appeal, on the ground that the order for the interlocutory injunction had become merged in the final decree, was submitted, but consideration postponed to the hearing on the merits. The motion is now granted and the appeal in No. 193 dismissed. *Shaffer v. Carter*, 40 S. Ct. 221, 252 U. S. 37, 44, 64 L. Ed. 445; *Pacific Tel. Co. v. Kuykendall*, 44 S. Ct. 553, 265 U. S. 196, 205, 68 L. Ed. 975. In the cases cited, both interlocutory and permanent injunctions had been denied; here they were granted; but the record discloses no reason which prevents the same principle from being applicable.

The averments of the bill, which, upon this record, must be taken as true, disclose the following facts:

The operations of the company were conducted with reasonable economy. For the year 1921, the net revenues, after payment of operating expenses and taxes, were, in round figures, \$46,000; for the year 1922, there was a deficit of over \$48,000; for 1923, a deficit of nearly \$65,000; and a deficit for each month of the year 1924 preceding the filing of the bill. The fair value of the property, including working capital, material and supplies, and going value, was at least \$3,800,000.

In July, 1919, the predecessor in ownership of the company filed with the commission a schedule of rates covering the telephone service in question, which the commission, by final order after a hearing, approved. Prior to that order, however, the predecessor of the company had filed with the commission a second schedule of increased rates, to become effective May 1, 1920. The commission first suspended the effective date of this schedule until August 29, 1920, and then, by successive orders, until February 26, 1921, August 26, 1921, and February 23, 1922. The present company, in December, 1920, succeeded to the property and rights of its predecessor.

During 1920, hearings were had before the commission in respect of

the justice and reasonableness of the rates proposed by the second schedule, but no determination of the matter was reached. The commission, although often requested by the company to do so, thereafter failed and refused to hold further hearings, but on October 31, 1921, entered an order purporting permanently to suspend, cancel, and annul the second schedule. A hearing was applied for and denied.

Thereupon an appeal was prosecuted to the circuit court of Peoria county, and that court, on April 6, 1922, reversed the commission's order and remanded the cause for further proceedings. The commission redocketed the cause and had hearings in June, July, and September, 1922, after which the company filed its written motion requesting the commission to make effective a temporary schedule of rates pending a final determination. This motion was denied on September 28, 1922. On July 5, 1923, the company called attention to the delay in the determination of the cause and to the fact that the revenues derived from the operation of the Peoria exchange fell short of meeting its operating expenses and requested the commission to set the cause for an early hearing. This request was ignored and the commission ever since has failed and refused to determine the issues in the cause or to determine whether the rates and charges provided in the second schedule are just and reasonable, but has continued in effect the rates and charges contained in the first schedule approved by it. These rates, not only do not yield a fair return, but are insufficient to pay the operating cost of rendering telephone service to the subscribers and patrons of the exchange. Finally, it is alleged that the company is deprived of its property without due process of law, and is denied the equal protection of the law, in violation of the Fourteenth Amendment to the federal Constitution.

This conclusion, which necessarily results from the facts, is not seriously challenged, but a reversal of the decree below is sought on the ground that the company, prior to filing its bill, had not exhausted its legislative remedies. The argument seems to be that the second proposed schedule of rates, filed while the first was pending, purported to cancel the first schedule; that the order putting into force the rates in the first schedule was in effect a finding against the second, and put an end to it; that no legal application for an increase of rates has since been made; therefore, when the suit was brought nothing was before the commission upon which that body could lawfully act. The short answer is that the commission after disposing of the first schedule, had uniformly treated the second as pending; had held hearings and made interlocutory orders in respect of it; had entered an order for its permanent suspension; after reversal by the state court on appeal, by which tribunal it was regarded as properly pending, had restored it to the docket for further proceedings; and had held further hearings. To say now that all this shall go for naught, and that the company must institute another and distinct proceeding, would be to put aside substance for needless ceremony.

It thus appears that, following the decree of the state court reversing the permanent order in respect of the second schedule and directing further proceedings, the commission for a period of two years remained practically dormant, and nothing in the circumstances suggests that it had any intention of going further with the matter. For this apparent neglect on the part of the commission, no reason or excuse has been given; and it is just to say that without explanation, its conduct evinces an entire lack of that acute appreciation of justice which should characterize a tribunal charged with the delicate and important duty of regulating the rates of a public utility with fairness to its patrons, but with a hand quick to preserve it from confiscation. Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmation of them; and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief. The facts, which the motion to dismiss conceded, present a far stronger case for such relief than any of the cases with which this court dealt in *Okla. Gas Co. v. Russell*, 43 S. Ct. 353, 261 U. S. 290, 293, 67 L. Ed. 659, *Prendergast v. N. Y. Tel. Co.*, 43 S. Ct. 466, 262 U. S. 43, 49, 67 L. Ed. 853; *Pacific Tel. Co. v. Kuykendall*, *supra*, 204 (44 S. Ct. 553), and *Banton v. Belt Line Ry.*, 45 S. Ct. 534, 268 U. S. 413, 415, 69 L. Ed. 1020.

Some complaint is made to the effect that the decree attempts to bind persons not parties to the suit, including thousands of subscribers, and to prohibit appellants from enforcing in the future any legislative remedy for excessive charges, hereafter imposed, however unreasonable they may be. As to the first branch of the complaint, it is only necessary to say that the commission represents the public and especially the subscribers, and they are properly bound by the decree. In *re Engelhard & Sons Co.*, 34 S. Ct. 258, 231 U. S. 646, 651, 58 L. Ed. 416. As to the other objection, there is nothing in the decree, rightly construed, which attempts to curtail or could curtail the legislative or rate-making powers of appellants to proceed hereafter under the state law, subject to such limitations, if any, as may be required by the doctrines of *res judicata*, ordinarily applicable in such cases.

Decree affirmed.

Mr. Justice STONE took no part in the consideration or decision of these cases.



## WILSON v. BOWERS, Collector of Internal Revenue.

District Court of the United States, S. D. New York, 1924. 14 F.(2d) 976.

AUGUSTUS N. HAND, District Judge. This suit is brought to procure a final decree restraining the defendant, the collector of internal revenue, from refusing to honor complainant's application for withdrawals of specially denatured alcohol for which he has a basic permit granted under the Volstead Act (Comp. St. § 10138 $\frac{1}{4}$  et seq.). This permit was granted by the collection \* after the application and bond were approved by the Commissioner.

The motion before the court is for a preliminary injunction to restrain the defendant from refusing to honor applications for withdrawals, upon the ground that, so long as the basic permit is in force and officially unrevoked, no power exists to suspend the rights which the complainant acquired under it. The latter insists (1) that the revocation proceedings which have been instituted are void because not in compliance with the statute; (2) that irrespective of the validity of the revocation proceeding the collector has no right to suspend the benefit of the basic permit unless and until it is duly revoked.

The question which has occurred to me at the outset is whether there is any jurisdiction in this court to grant the relief prayed for in the complaint, or on the motion for a preliminary injunction; in other words, whether it is not an indirect way of applying for a writ of mandamus which, in the absence of congressional legislation, the court has no power to issue in an original action brought to secure relief by such a writ. *Covington Bridge Co. v. Hager*, 203 U. S. 109, 27 S. Ct. 24, 51 L. Ed. 111; *Knapp v. Lake Shore & Michigan Southern Ry. Co.*, 197 U. S. 536, 25 S. Ct. 538, 49 L. Ed. 870. While it is admitted by the counsel for the complainant that under settled law no general power of mandamus resides in this court, it is contended that the effect of the bill and of the motion herein is not that of an application for a mandamus. I am referred to the case of *Jacob Hoffman Brewing Co. v. McElligott* (D. C.) 259 F. 321, where I refused to dismiss a bill brought to restrain an attempted enforcement of the War-Time Prohibition Act (Comp. St. §§ 3115 $\frac{1}{2}$ f-3115 $\frac{1}{2}$ h), and, among other things, to restrain the collector of internal revenue from refusing to issue revenue stamps to the brewer. A preliminary injunction was granted by Judge Mayer, restraining the collector from refusing to issue the stamps, and was affirmed by Judges Ward and Hough (Judge Rogers dissenting) in the Circuit Court of Appeals, 259 F. 525, 170 C. C. A. 487.

I think there probably is a distinction, as pointed out by counsel for the complaint, between an application for a mandamus requiring an official in general to take certain action and an injunction restraining

\* So in original; should read "collector."

his refusal upon some particular ground which he sets up as a consideration legally controlling; at least I cannot reconcile otherwise the Jacob Hoffman Brewing Company Case and also certain cases where the collector has been restrained from refusing to enter goods by reason of alleged violations of the Trade-Mark Act (Comp. St. § 9485 et seq.) with the decisions of the Supreme Court I have quoted relating to mandamus. It is therefore my opinion that an application for an injunction limited to an order restraining the collector from refusing to approve complainant's application for withdrawal of October 25, 1923, on the ground that the basic permit No. 177 is under suspension, has been properly made.

The question is raised by the government as to whether the Commissioner of Internal Revenue and the Prohibition Commissioner are not necessary parties. If the collector refuses to issue a withdrawal permit, because of some direction of the Commissioner which is not warranted by the statute, I cannot see how any official except the collector is a necessary party. He, under the regulations of the department, after the basic permit has issued, is charged with the duty of issuing withdrawal permits. The only question which would seem to arise is whether there is any power on the part of any one to suspend the operation of the basic permit pending the determination of a revocation proceeding before the department. If there is no such power at all, then the duty of the collector not to refuse withdrawal permits because of such a suspension is clear, and the mere attempt to suspend by an official who was given no right to do so by the statute does not seem to me to make him a necessary party.

As for the attempted suspension, I agree with the conclusions of Judge Lynch and Judge Runyon in *New Jersey Wholesale Drug Co. v. Brown* (D. C.) 289 F. 108, and *Fiedler v. Moss* (D. C.) 287 F. 934, that the words in title 2, § 9, of the National Prohibition Act (Comp. St. § 10138½dd), "During the pendency of such action such permit shall be temporarily revoked," refer only to the period of review in the United States District Court given the permittee whose permit has been revoked. The government argues that, if the word "action" refers only to the review of the decision of the Commissioner before a court of equity, the provision that "such permit shall be temporarily revoked" is of no value, because it already had been revoked by the Commissioner himself.

This argument is by no means without weight. On the other hand, it is not only true that it would be a very drastic doctrine which made the filing of a complaint before the Commissioner an automatic suspension of the basic permit, but it is of greater force that the words "during the pendency of such action such permit shall be temporarily revoked" immediately follow the clause providing for a review of a decision of the Commissioner revoking the permit before a court of equity. This close proximity of the two clauses makes me quite certain that the word "action" has its more usual meaning, and refers to

the review in equity rather than to the departmental proceeding. I would suggest this answer to the government's argument that the clause "during the pendency of such action such permit shall be temporarily revoked" is made unimportant by the construction that I have given it:

The review provided by the statute is in the nature of an appeal. Contention is constantly made that an appeal operates as a supersedeas. Those who drafted the act might well have wished to dispel forever the possibility of the contention either that the review operated as a supersedeas or even permitted the court to grant a supersedeas. They therefore established the clause "during the pendency of such action such permit shall be temporarily revoked" as a mandatory requirement of the statute, preventing any action to keep alive the permit, or to stay the revocation thereof, while the suit in equity was pending.

In the circumstances I think the limited form of injunction which I have outlined should issue. It neither does, nor is intended to, in any way act as a mandamus, nor directly or indirectly to require the collector to issue withdrawal permits if, as has been charged, the amount to be furnished under the basic permit has already been exhausted.

Settle order on notice.<sup>8</sup>

<sup>8</sup> See, also, *Fox Film Corporation v. Chicago* (D. C.) 247 F. 231 (1917), affirmed (C. C. A.) 251 F. 883 (1918), granting an injunction against interfering with the exhibition of a moving picture, where in the state courts the proper course would have been to obtain a mandamus compelling the grant of a permit (*Grace Church v. Zion City*, 300 Ill. 513, 133 N. E. 268 [1921]); also, *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 S. Ct. 33, 47 L. Ed. 90 (1902), enjoining a postmaster from carrying out an order of the Postmaster General directing the detention of letters addressed to a corporation.



## SECTION 49.—DECLARATORY RELIEF

## DYSON v. ATTORNEY GENERAL.

Court of Appeal, King's Bench Division. [1911] 1 K. B. 418.

FLETCHER MOULTON, L. J. In this case the plaintiff has received a paper from the Commissioners of Inland Revenue (known ordinarily as Form No. IV) making certain inquiries and threatening him with a penalty unless the inquiries are answered by a certain date, and he is desirous of testing the legality of the procedure, and for that purpose has brought an action against the Attorney General for a declaration that he is under no obligation to comply.

The law advisers to the crown, being of opinion that this course was not open to the plaintiff, took out a summons to dismiss the action on the ground that it was frivolous and vexatious and disclosed no reasonable cause of action. The Master and the judge approved of their contention, and it is from this decision of the judge in chambers that the present appeal is brought.

Now it is unquestionable that, both under the inherent power of the court and also under a specific rule to that effect made under the Judicature Act, the court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region, and the courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff's claim as a matter of law. Differences of law, just as differences of fact, are normally to be decided by trial after hearing in court, and not to be refused a hearing in court by an order of the judge in chambers. Nothing more clearly indicates this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of the judge at chambers in the case of such an order as this. So far as the rules are concerned an action may be stopped by this procedure without the question of its justifiability ever being brought before a court. To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this

way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost uncontestably bad.

The objection taken by the crown in the present case was solely that there was no justification or precedent for the form of the action. Neither side has discussed the merits either here or at chambers. Mr. Rowlatt on behalf of the Crown frankly stated that in chambers he relied solely on a paragraph in *Mitford on Pleading*, which he considered to support his contention, and the master and the judge took his view. In my opinion the passage does not bear the interpretation which he puts upon it. If it does bear that meaning it does not accurately state the law at the time, for it would be inconsistent with the case of *Hodge v. Attorney General*, 3 Y. & C. Ex. 342, where an action was brought against the Attorney General as sole defendant as representing the crown in order to obtain a declaration affecting the rights of the crown and consequent relief. Moreover, even if the statement of *Mitford* could have been supported in the then state of the law (which did not permit of actions for declarations unless the court could also grant specific relief), I should not be prepared to hold that it is correct in the present state of the law which permits of an action whose sole object is a declaratory judgment.

The question in what branch of the jurisdiction of the old Court of Exchequer the case of *Hodge v. Attorney General*, 3 Y. & C. Ex. 342, was decided has been hotly contested before us in the argument in this case. I do not propose to enter into this question. The very fact that the parties agree that the answer we give in so recondite a matter may have an important, and in one alternative decisive, effect on the right to bring the present action, shews conclusively to my mind that it is not a case for the exercise of these exceptional powers. For, as I have said, an order of this kind ought not to be made where there is any reasonable ground for argument as to the maintainability of the action. Moreover it is unfair on the judge at chambers himself to require him to decide a question involving such an investigation of old authorities none of which are or can be properly called to his notice.

The sole question for our decision on the present occasion is whether or not this order should have been made in this case, and therefore I have no hesitation in coming to the conclusion that this appeal ought to be allowed.<sup>9</sup>

<sup>9</sup> See, also, *De Verteuil v. Knaggs*, [1918] A. C. 557, *supra*, as to the availability of declaratory relief to determine the extent of powers of public authorities. See, also, *Yale University v. New Haven*, 104 Conn. 610, 134 A. 268, 47 A. L. R. 667 (1926); *Williams v. Molther* (C. C. A.) 198 F. 460 (1912).

As to declaratory relief in the federal courts (denied), see *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, 47 S. Ct. 282, 71 L. Ed. 541 (1927).

## CHAPTER 12

### APPEAL TO COURT<sup>1</sup>

#### SECTION 50.—QUESTION WHETHER EXERCISE OF JUDICIAL POWER

##### CITY OF AURORA v. SCHOBERLEIN.

Supreme Court of Illinois, 1907. 230 Ill. 496, 82 N. E. 860.

Appeal from circuit court, Kane county.

Proceeding by the City of Aurora against Adam Schoberlein, as Fire Marshal. From the judgment, the City appeals. Reversed.

CARTWRIGHT, J. On July 10, 1905, written charges against appellee, fire marshal of the city of Aurora, were presented to the board of fire and police commissioners of said city in pursuance of section 12 of an act entitled "An act to provide for the appointment of a board of fire and police commissioners in all cities of this state having a population of not less than seven thousand nor more than one hundred thousand, and prescribing the powers and duties of such board," in force April 2, 1903. Laws 1903, p. 97. After an investigation, at which appellee was heard in his own defense, the board found him guilty as charged and made an order removing him from office. Within 10 days after the entry of the order appellee filed with the secretary of the board a bond for an appeal to the circuit court of Kane county, in which said city is located, and on November 21, 1905, the secretary transmitted to the court a transcript of the proceedings before the board, in compliance with section 18 (page 100) of said act, which purports to allow an appeal to the circuit court from any order of a board created under the act. The record recites that appellant filed its motion to dismiss the appeal on the ground that

<sup>1</sup> ADMINISTRATIVE APPEAL.—An official power of supervision, etc., involves a right to entertain appeals (*Magwire v. Tyler*, 1 Black, 195, 202, 17 L. Ed. 137 [1861]), unless negated by the course of legislation. See *Butterworth v. United States*, 112 U. S. 50, 5 S. Ct. 25, 28 L. Ed. 656 (1884). But as a rule there is no right to appeal from the head of a department to the chief executive. *Memorial of Captain Meigs*, 9 Ops. Attys. Gen. 462 (1860); *Bollman's Case*, 10 Ops. Attys. Gen. 526 (1863); *Las Animas Grant*, 15 Ops. Attys. Gen. 94, 100 (1876).

A decision by a court, under statutory provision for appeal from an administrative officer, has been held to be an administrative, and not a judicial decision, where it merely governs further proceedings before the officer, and does not conclude the private right from being asserted in a judicial proceeding. *Frasch v. Moore*, 211 U. S. 1, 29 S. Ct. 6, 53 L. Ed. 65 (1908); *Postum Cereal Co. v. Calif. Fig Nut Co.*, 272 U. S. 693, 47 S. Ct. 284, 71 L. Ed. 478 (1927).



section 18 is unconstitutional and void, and the court denied the motion. No bill of exceptions was taken at the time, and there was no extension of time for tendering such a bill.

The appeal was subsequently called for trial before another judge, and the court ordered a trial *de novo*, against the objection of appellant, and called a jury against like objection. The files of the proceeding consisted of the written charges, the evidence produced before the board, and the order of removal, and the jury were sworn to try the issues joined and a true verdict render according to the evidence. Both parties introduced testimony relating to the charges, and at the conclusion of the evidence the court, on motion of appellee, instructed the jury to find him not guilty. A verdict of not guilty was thereupon returned, and the court entered an order reversing the order of the board removing appellee from office, and ordered the board forthwith to reinstate and re-employ him as fire marshal, and to allow him to perform the duties and services connected with that office and collect the salary and compensation allowed therefor, and also rendered judgment against appellant for costs. From that judgment an appeal was prosecuted to this court, and among other assignments of error is one that the circuit court had no jurisdiction of the subject-matter, and that section 18 of said act authorizing an appeal is unconstitutional and void. \* \* \*

The board of fire and police commissioners of the city of Aurora is a branch of the executive department of the city government, and all the acts and powers of the board are purely ministerial or executive. The Legislature could not confer upon the board any judicial power whatever. By article 3 of the Constitution the powers of the government are divided into three distinct departments, the legislative, executive, and judicial, and it is provided that no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as thereafter expressly directed or permitted. By section 1 of article 6 the judicial powers are vested in certain courts, and a board of fire and police commissioners cannot assume or exercise any part of the judicial power. *George v. People*, 167 Ill. 447, 47 N. E. 741. Neither does the act purport to give to such boards any judicial power. They are authorized by statute to remove an officer for cause, after a hearing and an opportunity to make a defense, and that authority implies the power to judge of the existence and sufficiency of the cause; but there is no such thing as title or property in a public office, and the removal of an officer is not the exercise of judicial power. *Donahue v. Will County*, 100 Ill. 94; *Stern v. People*, 102 Ill. 540. No right of life, liberty, or property was involved or adjudicated before the board in this case. Although the exercise of the power of removal involved judgment and discretion, it was not a judicial act. It has been said that where an act is the result of judgment and discretion and a decision upon the facts it is of a judicial

nature; but there is a clear distinction between such acts and the exercise of judicial power which adjudicates upon and protects the rights and interests of individuals and to that end construes and applies the law.

An appeal is a step in a judicial proceeding, and in legal contemplation there can be no appeal where there has been no decision by a judicial tribunal. Two things are essential to an appeal, in its proper sense: First, the decision of a judicial tribunal; and, second, a superior court invested with authority to review the decision of the inferior tribunal. Elliott on Appellate Procedure, § 15. There have been cases where the jurisdiction of courts has been sustained in what were called appeals from inferior bodies having nonjudicial powers, such as the case of establishing a road by commissioners involving an appraisal of damages (*County of Peoria v. Harvey*, 18 Ill. 364), or an assessment of damages for a right of way (*Joliet & Chicago Railroad Co. v. Barrows*, 24 Ill. 562), or the trial of a right to property levied upon and claimed by a third party before a sheriff and jury (*Rowe v. Bowen*, 28 Ill. 116), or an assessment of property for taxation (*Bureau County v. Chicago, Burlington & Quincy Railroad Co.*, 44 Ill. 229). The nature of such proceedings was explained in the case of *Maxwell v. People*, 189 Ill. 546, 59 N. E. 1101, where it was held that there can be no such thing as an appeal, in a legal sense, from a nonjudicial body to a court. It was said that appellate jurisdiction is the attribute of a court created for reviewing the decisions of inferior courts and not of inferior bodies nonjudicial in character, citing *People v. Cook Circuit Court*, 169 Ill. 201, 48 N. E. 717, and it was held that this court takes jurisdiction of what is called an appeal in cases relating to the revenue, in the exercise of its original jurisdiction conferred by the Constitution. If a controversy belongs to a class of cases of which a court has original jurisdiction, and it is brought before the court in the method prescribed by the Legislature, the court may take jurisdiction by virtue of its general powers; but so far as the remedy is judicial it begins with a presentation of the case to the court.

The cases in which appeals from nonjudicial bodies to courts have been recognized have involved individual or property rights of which the court had jurisdiction under some other form of procedure, and belonged to classes of cases in which the court, acting judicially, could afford a remedy. This proceeding is not of that character. The section in question purports to authorize an appeal from any order of the board by any person interested or affected, and if it should be sustained it would result in the circuit courts assuming and exercising executive powers. They would practically control the appointment and removal of members of fire departments in the cities of this state to which the act applies, by the exercise of judgment and discretion as to fitness and qualifications of individuals for positions in such departments, and not by adjudicating rights

or applying the rules of law. That would be the exercise of executive powers, which the separation of departments of the government precludes the court from exercising.

The fact that courts have jurisdiction to issue the common-law writ of certiorari to determine whether inferior bodies have acquired jurisdiction to act and have proceeded according to law can have no influence upon the question here involved. The courts do not, by virtue of that writ, review the decisions of the inferior bodies or determine the facts. It has been held competent for the Legislature to confer on persons holding judicial offices the power to appoint officers whose selection or appointment cannot be classed as belonging to either of the departments of government (*People v. Morgan*, 90 Ill. 558; *People v. Hoffman*, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793); but we do not think there can be any doubt that officers of a fire department belong to the executive branch of the government.

Section 18, which purports to authorize an appeal to the circuit court from any order of a board of fire and police commissioners, is unconstitutional and void, and the judgment of the circuit court is reversed.

Judgment reversed.<sup>2</sup>

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### SENATE DEBATE ON RADIO BILL.

Congressional Record, June 30, 1926, p. 12373.

Mr. BRATTON. I assume that the members of the commission will render proper and just decisions. But assume that through error or a mistake of judgment the commission should discontinue the license of a given concern that had a vast sum of money invested. As I understand, under the bill as it passed the House the licensee would have a right to appeal to the courts and have a judicial determination, thereby avoiding having its entire investment wiped out by a department of the government, with no opportunity for review.

The Senate committee bill does not seem to carry that provision. Under the Senate committee bill a concern might have a million dollars invested and be operating under its license. At the expiration of the license the commission might decline to renew it or extend it, and

<sup>2</sup> In *Sangamon County v. Brown*, 13 Ill. 207 (1851), it was held, where the statute gave an appeal from the decision of the county court in highway proceedings to the circuit court, the case to be acted upon in such manner as the court may determine, with a view to justice and the establishment of the road, that the only question to be reviewed, if the county court acquired jurisdiction and proceeded regularly, was the amount of damages, and that the question whether the public interests demanded the construction of the road was a matter resting in the sound discretion of the county court, with which the circuit court had nothing to do.

See, also, *Board of Commissioners of Vigo County v. Davis*, 136 Ind. 503, 36 N. E. 141, 22 L. R. A. 515 (1894).



apparently under the bill the licensee would have no way to secure redress, no way to get a judicial determination of its rights, but inevitably, if a thing of that kind should happen, its property would be junked and would become worthless.

I am interested in that matter, and, frankly, I think we should be careful in all legislation to grant the right of review from any decision of governmental departments, especially where such large sums might be involved.

Mr. DILL. Mr. President, I want to say to the Senator that such provision for court review was in the bill that I presented to the committee. The committee, by a divided vote, struck it out, and I feel called upon myself to support the committee's action, having charge of the bill. I may say that the Senator from Arkansas [Mr. Robinson] has offered an amendment, which is printed, I think, to put into the bill a court provision similar to what was in the bill as it passed the House.

Mr. BRATTON. That satisfies my inquiry, because conceding every good purpose to the members of the commission, I am unwilling to put it within their power to dispose of a matter involving millions of dollars and deprive citizens or corporations of any way to secure redress through judicial proceedings. I think it is a dangerous policy and might lead to extremely bad results.

Mr. DILL. I may say to the Senator that the Senator from Iowa [Mr. Cummins] is, I think, the strongest advocate of striking out the court provision, and I would rather he would present the committee's reasons for striking out the provision for court review than for me to attempt to do it.

Mr. CUMMINS. The first objection I have to a provision for an appeal to a court from a decision of the commission is that we are just at the beginning of this great enterprise.

No one has any right to use any wave length or wave band. There will be hundreds of applications beyond the capacity of the commission to grant or beyond the bearing capacity of the air or ether so far as we have now developed it. If every man dissatisfied with the action of the commission in assigning a wave length or in fixing the hours during which a particular wave length may be used were to appeal, we would suspend the practical operation of broadcasting and other radio service almost indefinitely. I can not conceive of anything that more requires speedy, prompt disposition than the applications which would be before the commission for the various wave lengths.

Then my further objection is that I do not believe the proposal which is contained in the amendment which will be offered, as I understand it, can be constitutionally carried into effect. I have been contending for a long time that we can not appeal from an administrative body to a judicial body. We must find some other way than by a mere appeal to review the action of the administrative body. I know of but one instance in which we have attempted to do it, and that is in the case of the Board of Tax Appeals. I made the same objection with regard to the

composition or constitution of that board and its relation to the courts that I make to this one. It can not be done. We can appeal from one judicial body to another on any other terms than the legislative assembly or branch of the government may determine. But when we appeal from the action of the radio commission to a court where is the record? From what do we appeal? There is no provision—and I suppose there could not be any provision—that all the circumstances or hearings upon which the commission should decide are to be taken down in writing and preserved and exceptions filed, as they are in the case of a trial before a court. There is a way, of course, to attack the order of any administrative body. That is the way pointed out in the orders of the Interstate Commerce Commission or of the Federal Trade Commission or other commissions or boards to which I might refer.

Mr. ROBINSON of Arkansas. The Senator from Iowa has suggested the difficulty of giving an effective right of appeal from a decision of the commission to the court. I point out to him that in the amendment which has been referred to by the Senator from Washington as having been offered by myself is this language and other language, but this pertains to the point which the Senator from Iowa was discussing:

"The commission shall be notified of said appeal by service upon it, prior to the filing thereof, of a certified copy of said appeal and of the reasons therefor. Within 20 days after the filing of said appeal the commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the original application for a permit or license or in the hearing upon said order of revocation, and also a like copy of its decision thereon and a full statement in writing of the facts and the grounds for its decision as found and given by it. Within 20 days after the filing of said statement by the commission either party may give notice to the court of his desire to adduce additional evidence. Said notice shall be in the form of a verified petition stating the nature and character of said additional evidence, and the court may thereupon order such evidence to be taken in such manner and upon such terms and conditions as it may deem proper."

I did not prepare that provision, and therefore my approval of it cannot be regarded as the result of admiration for my own efforts.

Mr. CUMMINS. I should never accuse the Senator from Arkansas of that.

Mr. ROBINSON of Arkansas. The Senator from Iowa is very generous. I think the question of the Senator from Iowa is completely answered by the provision which I have just read. The party who feels aggrieved by the decision of the commission may notify the commission of his desire to appeal, and thereupon it becomes the duty of the commission to file what is in the nature of a certified record of the proceedings, including all evidence heard by the commission. Then if either party to the controversy desires to adduce additional evidence, they may be

permitted to do it under conditions fixed by the commission. I think that gives a substantial and effective right of appeal. I think it gives a hearing in the courts. I think that legislation of this character ought to secure the right of a court hearing to the individual who feels aggrieved by reason of a decision of the commission.

I know that most federal commissions consist of very able, learned, and just persons. The discussions which have gone on in this chamber concerning federal commissions do not perhaps justify the statement which I am making. Nevertheless, it frequently happens that commissions act arbitrarily and when they do so there is nothing better to be done, from the standpoint of the lawmaker, the man who wants to put himself in the position of enabling citizens to secure justice, than to provide for a hearing in a court. That is exactly what this provision does. It is true that it is somewhat anomalous in the fact that it is an appeal from a commission to a court, but we have the same practical condition with respect to decisions of the Interstate Commerce Commission, State railway commissions, and other commissions. Nearly all of the states provide some process by which a decision of a state commission may be reviewed by a court. I think it has usually proved wholesome. It is a satisfying thing to the citizen to know that when he is convinced that he has been, or is being, deprived of his rights by the arbitrary action of a governmental agency, he may have his case heard and his right determined finally by a court created under the laws of his state or his nation. I believe that the provision is not only a just one but that it is a practicable one.

Mr. CUMMINS. Mr. President, I suggest to the Senator from Arkansas, if it is accompanied with another amendment, it would answer the objection which I made that there is no record upon which to appeal. There is nothing in the bill which compels the commission to preserve all the evidence which may be submitted, but that is a small matter. Let me suggest a query to the Senator from Arkansas, who has a keen comprehensive sense of the law, What right can one be deprived of? No one has any right to the use of the air above any other person. The bill starts out by declaring that there is no right now in existence with regard to the use of what we ordinarily call the air. There is no rule laid down in the bill which would enable a court or a commission to determine who ought to have a broadcasting privilege as distinguished from any other person or corporation. Am I not right about that? It is committed to the commission purely as a matter of discretion.

Mr. DILL. We have tried to write a policy in the bill, as the Senator will recall.

Mr. CUMMINS. Yes; there is a policy, but there is no fixed and determinate right.

Mr. ROBINSON of Arkansas. Assuming that there is a policy of procedure to regulate the conduct of the commission and the commission violates or disregards the plain policy of the law, then, of course,



an appeal to a court would be effective to preserve the rights and safeguard the interests of the citizen.

Mr. CUMMINS. I agree with that; not an appeal, but, in harmony with every other proceeding we have ever authorized for that purpose, the commission can be enjoined from completing or continuing the action which it has proposed.

Mr. ROBINSON of Arkansas. It matters not whether we call it an appeal or describe the remedy carried in the statute by some other name. The amendment which I have proposed provides a remedy for the person who feels that he has been aggrieved by a decision of the commission.

Mr. CUMMINS. Let me ask the Senator from Arkansas a question. Here are two persons or corporations appearing before the commission, each asking a license for a certain wave length. How is the commission to determine which should have the license? There is absolutely no law, no regulation; there is nothing that would indicate to the commission how it ought to decide the matter unless it be inferred that it is to be decided in the public interest. It must be given to the broadcasting station which can best serve the public, and even that is not provided for in the bill. I can not conceive of what will be tried in an appeal even if it were constitutional, possibly. What can be tried in an appeal from the commission to the court?

Mr. ROBINSON of Arkansas. The question is whether the commission has complied with the policy of the law and has performed its duty in the manner prescribed by the law as it relates to the right and claim of the citizen. That is all the question that could be tried under the provision, as I understand it.

Mr. CUMMINS. No citizen has such a right, and it is simply a matter of choice, but I agree it ought to be guided by the public interest, and it ought to be guided by the public policy; but, as a lawyer, I am utterly unable to see how an appeal can be prosecuted from this commission, which is bound by no rule, which does not administer any law.

Mr. DILL. Mr. President, I think the Senator is making a broader statement than he really intends to make when he says there is no rule and no law.

Mr. CUMMINS. The Senator will correct me, because he understands it. I wish the Senator would read that part of the bill which governs the commission in determining who shall have the license.

Mr. DILL. There are two provisions: One is that they shall grant licenses unless public convenience and interest forbids, and the other is that they shall give fair, efficient, and equitable radio service to each community. Those are the two things which really govern the commission, I should say.

Mr. CUMMINS. I instanced both of them when I said they were controlled only by what they regarded to be the public interest.

Mr. ROBINSON of Arkansas. Suppose the commission arbitrarily and manifestly disregards its duty in that particular?

Mr. CUMMINS. Then I say there ought to be an injunction issued against them.

Mr. ROBINSON of Arkansas. There is no reason why a remedy by appeal might not effect the same thing.<sup>3</sup>

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## SECTION 51.—FRESH EVIDENCE ON APPEAL

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### THOMPSON et al. v. KOCH.

Court of Appeals of Kentucky, 1895. 98 Ky. 400, 33 S. W. 96.

Application of August Koch to R. H. Thompson and others, constituting a license board, for a liquor license. The license was refused, and applicant appealed to the circuit court, which granted the license, from whose judgment the board appeals. Reversed.

PRYOR, C. J. Under the provisions of the statute for the government of cities of the first class in reference to the retailing of spirituous liquors, it is provided: "The judge of the city court, the chairman of the board of public safety, and the president of the commissioners of the sinking fund, are constituted a license board, the judge of the city court to be the chairman, and the secretary of the sinking fund shall be ex officio secretary." St. Ky. § 3030.

Section 3031 defines the manner in which the application for a license shall be made, and the qualifications of the applicant. Section 3033 provides that no license shall be granted to any person who has not the qualifications prescribed in section 3031, and further

<sup>3</sup> NOTE.—The Radio Act of 1927 (44 Stat. 1162) provides that if upon examination of any application for a station license the licensing authority shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance thereof in accordance with said finding. If the licensing authority upon examination of the application does not reach such decision, it shall notify the applicant, shall fix and give notice of a time and place for hearing and shall afford the applicant an opportunity to be heard under rules and regulations (section 11). An applicant whose application is refused shall have the right to appeal from the decision to the Court of Appeals of the District of Columbia. The licensing authority shall file with the court the evidence presented to it upon the application, a copy of its decision, and a full statement in writing of the facts and the ground for its decision as found and given by it. The court may order additional evidence to be taken. The court shall hear, review, and determine the appeal upon the record and evidence and may alter and revise the decision appealed from. The revision shall be confined to the points set forth in the reasons of appeal. It is to be noted that whereas, the appeal from the revocation of a license lies to the Court of Appeals of the District of Columbia or a District Court of the United States in the alternative, the appeal from a refusal lies only to the Court of Appeals of the District of Columbia, which latter court, under the decisions of the Supreme Court, may be looked upon as a nonjudicial administrative tribunal, when it reviews the action of an administrative authority. *Postum Cereal Co. v. Calif. Fig Nut Co.*, 272 U. S. 693, 47 S. Ct. 284, 71 L. Ed. 478 (1927).

provides: "No license shall be granted to retail liquor in any precinct, if in the opinion of the board, the retailing of liquor at the place named will be injurious to the people thereof, or if a majority of the voters of the precinct registered at the last annual registration remonstrate against the granting of the same." An appeal may be had to the circuit court, as is provided in the following section.

The section following, which is section 3034, provides: "Any license granted by said board may be revoked by it, after an open trial with due notice to the licensee, whenever in the judgment of said board, the licensee has conducted a disorderly house, or violated the law with respect to the sale of liquor, and either party who shall feel aggrieved by the decision of the board may have an appeal to the circuit court."

It is conceded the power to grant the license is with this license board, and, from the express language of the statute, the board, in its discretion, may refuse the license when, in the opinion of its members, the retailing of liquor will be injurious to the people of the precinct in which the liquor is proposed to be sold, or when a majority of the registered voters in the precinct at the last annual registration remonstrated against the granting of this privilege to the applicant. The board, constituted as the statute requires, heard the testimony for and against the applicant in this case, and refused to grant the license. An appeal was taken to the circuit court, and there the case heard *de novo*, and a judgment entered granting the license, and from that judgment an appeal has been taken to this court.

It is insisted by counsel for the applicant that no appeal lies from the judgment below to this court; that the board of license is merely advisory, is at best a tribunal with special and limited power, and cannot in any sense be deemed a court, because the present constitution expressly prohibits the lawmaking power from creating any other courts than those mentioned in that instrument. We perceive no objection to that character of legislation requiring or granting appeals from the judgments of boards of cities and towns, whether of the one class or the other, where those boards are vested with the power of hearing and determining questions, affecting the rights of the citizen, that pertain to the particular municipality in which those rights are asserted or denied. The power to grant licenses must be vested in somebody connected with or created for the purposes of municipal government, and, besides, this appeal comes from the circuit court, and its judgments are subject to the revisory power of this court, unless prohibited by law. An appeal lies to this court from the judgments of circuit courts in all cases other than those excepted by the statute. This law of license is a general law, applicable to all cities of the first class; and, the circuit court entertaining jurisdiction of the appeal, the right of appeal to this court is unquestioned, as it is not within any of the exceptions to the statute in which this court is denied appellate jurisdiction.



Counsel for the appellant insists that the circuit court had no power to reverse the judgment of the board rejecting the license, because that tribunal was invested with the discretionary power of granting or refusing such applications, and to take this discretion from the board, and place it with the judge of the circuit court, was never contemplated by the legislature. While it is not necessary to determine this question, it seems to us clear that, when such discretion is confided to certain boards, for the purposes of municipal government, and an appeal allowed, it should appear that the judgment of the board was the exercise of an arbitrary discretion before the circuit court would disregard its judgment, and therefore the circuit court should have before it the testimony upon which the board acted; for, otherwise, this discretion would be taken from those constituting the board, and confided alone to the circuit court. If the case is to be heard *de novo*, then the applicant, instead of seeking the judgment of the board as to his qualifications, and the necessity for granting the license, could decline to introduce his testimony, and submit to a judgment against him, and, by an appeal to another tribunal, deprive the municipality of the judgment of those selected by law to pass upon such questions.

When, therefore, this discretion is confided to certain boards, the facts upon which their action was based should go to the circuit court, in order to enable that court to determine whether or not the judgment of the board was an exercise of arbitrary power. If this mode of practice is not to be adopted, and we think this discretionary power cannot exist without it, then it appears, from the testimony heard below, that a decision might well have been rendered for either party; and, assuming the board acted alone upon the testimony heard by the circuit judge, still there was nothing to show that any arbitrary action was taken by the board, and for that reason, if no other, the judgment should have been affirmed.

The judgment of the circuit court is therefore reversed, with directions to dismiss the appeal taken from the license board.<sup>4</sup>

<sup>4</sup> See *Hopson's Appeal*, 65 Conn. 140, 31 Atl. 531 (1894): "The act of 1893, in permitting an appeal from the decisions of county commissioners to the superior court, called into action a judicial function for dealing with such appeal; but it did not alter the actual nature or extent of the power originally vested in the county commissioners for the selection of proper persons and proper places for the sale of liquors. The discretion necessary to the exercise of that power by the county commissioners is, by the appeal, transferred to the judge of the superior court; but there is nothing in the act which can be construed as attempting to vest in this [the Supreme] court the final exercise of that discretion, or the control of its exercise by a judge of the superior court. In dealing with such appeal the superior court is bound by the rules of law regulating the conditions on which the discretionary power of selection shall be exercised, such as the meaning and effect of the language of the regulating statutes, and the acts required by statutory regulations in order to permit any action on the original application or the appeal. The court is also bound by those fundamental rules of law that control all exercise of judicial, or quasi judicial, power. It may not, for instance, arbitrarily refuse to hear any evidence, or to listen to a person entitled to be heard. The failure of the court to comply with such rules may

STATE *ex rel.* SERRES *v.* DISTRICT COURT OF FIRST JUDICIAL DISTRICT.

Supreme Court of Montana, 1897. 19 Mont. 501, 48 Pac. 1104.

Application of the State of Montana, on the relation of J. R. Serres, for mandamus against the District Court of the First Judicial District of the state of Montana in and for the county of Lewis and Clarke. Writ awarded.

This is an application for a writ of mandamus. The petitioner alleges that he is a regular graduate of an accredited college of medicine; that he attended at least four courses of lectures at said college, of six months each; that on the first Tuesday of October, 1896, petitioner was an applicant to the board of medical examiners for a certificate entitling him to practice medicine and surgery in the state of Montana; that a meeting of said board was held in Helena on the day aforesaid; that at said meeting the petitioner presented his diploma from said medical college, evincing his graduation; that said diploma was found by the said board of examiners to be genuine, and issued by a regular medical college, legally or-

be error, which this court upon appeal will correct. But in exercising the duty of determining a suitable person and a suitable place for the sale of liquors, imposed on the county commissioners, and, by force of the appeal, transferred unchanged in its nature and extent to a judge of the superior court, the judge is engaged in settling a matter of discretion. In this case, certainly, the court was not engaged in the trial of 'matters of fact in any cause or action,' within the meaning of the statute regulating appeals to this court."

In *Norwalk Street Railway Company's Appeal*, 69 Conn. 576, 596, 37 Atl. 1080, 1087, 39 L. R. A. 794 (1897), the court said: "In *Hopson's Appeal*, 65 Conn. 140, 31 Atl. 531 (1894), we held that the selection or appointment of such a licensee was a means apparently appropriate both to the exercise of executive and judicial power; that the uniform practice of courts and Legislature in so treating such appointment might be safely accepted when the distinction to be drawn must be subtle and doubtful."

Further, in *Norwalk Street Railway Company's Appeal*, 69 Conn. 576, 37 Atl. 1080, 39 L. R. A. 794 (1897): "The act of 1893 confers upon city councils certain powers in establishing regulations for the location, construction, and operation of street railways, and requires a council, if requested by a railway company, to take some action within sixty days, and to notify the company in writing of its action. Whenever a council fails to give such written notice, the act of 1895 confers the same powers upon the 'superior court or any judge thereof,' to be exercised on application of a railway company, and calls this application an 'appeal.' \* \* \* The so-called 'appeal' in this case is not a process to invoke the judicial power. It is simply an application to the superior court to exercise a legislative function. \* \* \* We cannot recognize such a right, because the recognition leads inevitably to the obliteration of any line of separation between the judicial and other departments of the government."

See *New York Railroad Law*, § 94.

See, also, *Appeal of Spencer*, 78 Conn. 301, 61 Atl. 1010 (1905); *Tyson v. Washington Co.*, 78 Neb. 211, 110 N. W. 634, 12 L. R. A. (N. S.) 350 (1907).

As to appeals from administrative action concerning questions of right, see *United States v. Duell*, 172 U. S. 576, 19 Sup. Ct. 286, 43 L. Ed. 539 (1899).

ganized and in good standing; that he thereupon submitted to an examination in the various branches prescribed by law and the said board of examiners, and filed with the said board his examination papers, written upon the questions by the said board propounded in the said various branches; that thereupon said board denied the petitioner's application for a certificate to practice medicine and surgery in the state of Montana upon the ground that said examination papers showed that the petitioner had not the requisite learning to entitle him to such certificate; that, after being notified by said board of its determination not to grant this petitioner such certificate, he within 30 days duly appealed from the decision of the said board of medical examiners to the district court of the First judicial district of the state of Montana in and for the county of Lewis and Clarke; and that, after said appeal was duly taken to the district court, the said district court, on the motion of the county attorney of the said county and the Attorney General of the state, dismissed the petitioner's appeal, upon the ground that the said court had no jurisdiction to try and determine the same.

The petitioner asks for a writ of mandate in this proceeding, commanding the district court to reinstate his appeal and to proceed to the hearing and determination thereof. On the return of the writ, the Attorney General, for the said district court, demurred to the petition for the reasons—First, that said petition does not state facts sufficient to entitle said petitioner to the relief prayed for; and, second, that said petition shows affirmatively that the action of the medical board in refusing to issue a certificate for the cause specified was final, and not subject to review by any appellate tribunal, and that said defendant (district court), in dismissing said petition, acted correctly and within its jurisdiction, in that no appeal lay from the action of the board to said defendant.

PEMBERTON, C. J. (after stating the facts). The only question presented here is this: Does the statute allow an appeal to an applicant who has been refused a certificate by the medical board authorizing him to practice medicine and surgery in this state on the ground that the applicant's examination papers show that he has not the requisite learning to entitle him to such certificate?

Counsel for the defendant, the Attorney General, contends that the right of appeal exists only when the certificate is refused or revoked by the board for unprofessional, dishonorable, or immoral conduct, and that no appeal lies from the refusal of the board to issue a certificate on the ground of the incompetency of the applicant.

That part of section 603, Pol. Code, which provides for appeals from the action of the medical board is as follows: "In all cases of the refusal or revocation of a certificate to practice medicine by the said board, the person aggrieved thereby may appeal from the decision of the board to the district court of the county in which such revocation or refusal was made."



Counsel for defendant contends that this provision only gives the right of appeal where the certificate is refused or revoked by the board for unprofessional, dishonorable, or immoral conduct, and that *State v. District Court of First Judicial District*, 13 Mont. 370, 34 Pac. 298, in which this court discussed the right of appeal from the action of the medical board, does not go to the extent of deciding that an appeal lies in cases like the one at bar.

But, in examining our statute, we find no language that restricts the right of appeal to any particular class of cases. The terms of the statute are general, and give the right of appeal "in all cases of the refusal or revocation of a certificate to practice medicine by the said board." A number of the states have statutes like ours, but we are not referred to any decision of any of the states where the precise question here involved has been adjudicated and determined. The law provides that appeals in such cases shall be conducted like appeals from a decision of a board of county commissioners disallowing a claim. Pol. Code, § 603. Appeals from actions of boards of county commissioners are prosecuted and tried like appeals from a justice of the peace. Id. § 4289. Appeals from a justice court are tried *de novo*.

It is said by counsel for the defendant that a trial of this case *de novo* in the district court would be impracticable, if not impossible; that the court or jury could not try and determine the question of petitioner's competency to practice medicine. It is further insisted that the law does not provide any procedure by which the district court could properly try and determine this question.

In *State v. District Court of First Judicial District*, *supra*, this court held that the right of appeal was not rendered nugatory because the law did not prescribe rules to guide the district court in trying such appeal. This was when there were no proceedings or rules prescribed by law for appeals in such cases. The present statutes do prescribe the manner of appeal, and, if the proceedings prescribed by the statute are inefficient, under the provision of section 205, Code Civ. Proc., "any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the Code." Awkward, difficult, and unsatisfactory as a trial of this case in the district court might, and doubtless would, be, we are of the opinion that the learned district judge would be able to devise ways and means not incompatible with the Code for disposing of the case.

Impolitic and unwise as this law may be, still, if the Legislature has given the petitioner the right of appeal in this case, we have neither the right nor disposition to deprive him of its exercise by any unauthorized construction of the statute or by any apparent judicial legislation. Unless we construe or legislate something very material into the statute not placed there by the Legislature, we think the petitioner, under the law, which is broad and general in its terms, is entitled to prosecute his appeal in this case. Whether or not such

laws are wise or unwise, politic or impolitic, are questions for the legislative branch of the government, and we have no right or inclination to invade that domain.

The order of the district court dismissing the appeal in this case is reversed, and a peremptory writ of mandate is ordered to issue, directing that the district court reinstate said appeal and proceed to the trial of the cause.

Reversed.

BUCK, J., dissents.<sup>5</sup>

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### SMITH v. FOSTER.

District Court of the United States, S. D. New York, 1926. 15 F.(2d) 115.

THACHER, District Judge. \* \* \* What has been said applies with equal force to the conclusions of the Commissioner or his subordinates that the application was excessive in amount, and that no proof had been furnished of the probable requirements of the applicants' business. Clearly these were questions upon which the applicants were entitled to be heard before their application was summarily denied.

The plaintiffs having been deprived of the right to a fair and impartial hearing by the arbitrary action of the Commissioner and his subordinates, there can be no doubt that this court in the exercise of its broad equitable powers may afford whatever relief may be required to adequately protect the plaintiffs against further abuse of administrative authority. *Shreveport Drug Co. v. Jackson* (D. C.) 2 F.(2d) 64. The propriety of the relief, however, depends very largely upon the nature and purpose of this proceeding. If upon the issues raised by the pleadings the court within the intendment of the statute is not only to review the action and findings of the Commissioner or his subordinates, but is to determine upon evidence adduced at the trial, and not even considered by the Commissioner, the propriety of issuing a permit which the Commissioner has refused to issue, then it would be appropriate for the court to determine this question upon the testimony which was taken at the trial, but not heard by the Commissioner, and upon its conclusions of fact deduced therefrom to enter final decree directing the issuance or refusal of a permit. If, on the other hand, it was the purpose of the statute that the Commissioner in the exercise of a discretion judicial in character should determine the question as to the propriety of the issuance of a permit subject to review in the courts, the propriety of the determination of this question by the court in a case where there has been no adequate consideration thereof by the Com-

<sup>5</sup> The concurring opinion of Hunt, J., is omitted.

See *Laws Mont.* 1907, c. 100, providing for a trial of appeals by a jury of six physicians.

Compare *Raaf v. State Board of Medical Examiners*, 11 Idaho, 707, 84 Pac. 33 (1906); also *Munk v. Frink*, 75 Neb. 172, 106 N. W. 425 (1905).

missioner seems to me doubtful, even if it be assumed that the court has power under such circumstances to decide the question.

It will be helpful, therefore, to consider the nature of the proceedings in equity contemplated by the statute for a review of the Commissioner's decisions. In *O'Sullivan v. Potter* (D. C.) 290 F. 844, and *McGill v. Mellon* (D. C.) 5 F.(2d) 263, a proceeding to review the revocation of a permit was said by Judge Anderson to be "for most practical purposes a trial de novo." In *Schnitzler v. Yellowley* (D. C.) 290 F. 849, Judge Campbell, citing the *O'Sullivan Case*, said: "This is a trial de novo, and not merely a review of the Commissioner's decision, where no testimony can be received other than the record of the hearing before the Commissioner." Judge Inch, in *Hoell v. Mellon* (D. C.) 4 F.(2d) 859, following Judge Campbell's decision, said: "Accordingly while I agree that it is a trial de novo, it seems to me that this action is one in the nature of a bill of review," and further "that the purpose is to allow the decision to be reviewed within the limits ordinarily allowed in a bill of review. 'These are to correct errors apparent on the face of the record, and for newly discovered evidence after or for fraud in procuring the decision.' Montgomery's Manual of Federal Procedure, § 1180. It would also seem it was intended that on the facts before the Commissioner a different conclusion might be reached."

While Judge Inch's analogy to a bill of review is suggestive, his concluding statement shows that the remedy for erroneous action by the Commissioner is not to be confined within the narrow limits of a bill of review. The statute in terms requires the court to review the decision of the Commissioner, and to affirm, modify, or reverse the finding of the Commissioner as the facts and the law may warrant. Errors of law are to be corrected, whether appearing on the face of the record or not. Findings of fact are to be reviewed and revised if the court upon consideration of the findings of the Commissioner reaches contrary conclusions. On the other hand, it is quite apparent that the Act does not contemplate a new trial in every case. The controlling language which defines the right to review is found in section 5, which by adoption in section 6 applies to this proceeding. "The manufacturer may by appropriate proceeding in a court of equity have the action of the Commissioner reviewed, and the court may affirm, modify, or reverse the finding of the Commissioner as the facts and the law of the case may warrant."

The function of the court is then to review "the action of the Commissioner" and to deal with "the finding of the Commissioner" as the facts and the law of the case may require. To "review" the Commissioner's "action" implies consideration, first, of the evidence or want of it upon which he reached his conclusions of fact; and, second, of the lawfulness of his order in the light of the facts established by the evidence before him. If the court undertakes to try the case over again upon new evidence not before the Commissioner, it does not review the action of the Commissioner in any proper sense. Such a trial does



not result in the affirmance, modification, or reversal of the Commissioner's finding. It substitutes the action of the court for the action of the Commissioner, and results in new conclusions of law and of fact reached by the court upon evidence not considered by the Commissioner. In *O'Sullivan v. Potter*, *supra*, the precise ruling was that, in an action to review the decision of the Commissioner revoking a permit under section 9, the government in support of the Commissioner's action may plead and prove derelictions other than those considered by the Commissioner, in order to show that the permittee is not entitled to the relief demanded, even if the Commissioner's decision upon the record before him was wrong.

To this extent a trial *de novo* may be admissible, since it must always be open to the defendants in an action in equity to plead and prove facts which will defeat the plaintiffs' right to the relief demanded. In *McGill v. Mellon*, *supra*, there was a decree for the plaintiff because of the defendant's failure to allege and prove any derelictions justifying a revocation of the permit. It does not appear from the opinion whether or not the evidence taken before the Commissioner was reviewed by the court. If because of the lack of power to compel the attendance of witnesses and the production of documents before the Commissioner a fair hearing cannot be had, no doubt the court upon proper showing may through its processes compel the production of evidence thus unavailable before the Commissioner in order to supplement the record upon which he acted. *Shreveport Drug Co. v. Jackson* (D. C.) 2 F.(2d) 64. Nothing short of this would afford the full protection which was apparently intended to be conferred by the statute.

But in the absence of some such necessity I cannot believe that the court should undertake to decide in the first instance the propriety of granting or refusing a permit. In the *Shreveport Case*, Judge Dawkins said, in speaking of the revocation of the permit: "If it had been intended that the question should be decided primarily by the court, it seems that the law would have required that the proceeding to revoke be brought there where all the processes and machinery of the courts could be utilized to that end. This it did not do, but granted merely to the permittee the right to have the ruling of the Commissioner reviewed under the equity powers of the courts."

From what has been said, the appropriate relief in this case seems clear. The Commissioner having denied the applicants a hearing, there is no record before the court such as the statute contemplates as a basis for the Commissioner's ruling which is to be reviewed, or the ruling of the court upon the review thereof. The Commissioner's position will therefore be reversed, with directions to reinstate the plaintiffs' application upon the refiling of a proper bond, and to promptly thereafter grant the plaintiffs a hearing upon all objections which may be made to the issuance of a permit. This hearing should be held without delay, and the order may so provide. Furthermore, in order that the applicants may not be prejudiced by further delay in procuring a review

of any decision of the Commissioner upon their application, jurisdiction of the suit will be retained and the Commissioner will be directed to file within 30 days (unless such period be extended by order of this court) his decision, with a statement of the grounds thereof, together with the evidence in support thereof. If the permit applied for is refused, the court will upon motion review the decision and render such final decree as the law and the facts may warrant.

Note.—Upon motion subsequently made to review the action of the Commissioner in refusing a permit after rehearing, the action of the Commissioner was affirmed, and the complaint dismissed.\*

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In re FRANKLIN FILM MFG. CORP.

Supreme Court of Pennsylvania, 1916. 253 Pa. 422, 98 A. 623.

MOSCHZISKER, J. This case comes to us on certiorari from the common pleas of Philadelphia county, acting on an appeal from a decision of the Pennsylvania state board of censors. The board directed the elimination of certain portions of a film entitled "Virtue." The court below reversed the censors, and they have appealed.

Act May 15, 1915 (P. L. 534) § 3, creates a board to consist of three citizens, "well qualified by education and experience," to perform the duties of motion picture censors. It directs that, before assuming office, they shall take the oath prescribed by the Constitution; that they "shall examine or supervise the examination of all films, reels, or views to be exhibited or used in Pennsylvania, \* \* \* and shall disapprove such as are sacrilegious, obscene, indecent, or immoral, or such as tend, in the judgment of the board, to debase or corrupt morals" (section 6); that they shall keep a record of all examinations and state therein the reason for any disapproval; finally, that, whenever an elimination is ordered, the persons submitting the film may demand an examination by a majority of the board of censors, "with the right of appeal from the decision of the board to the court of common pleas of the proper county."

The phrase last quoted is all that is said upon the subject of appeal, and there is room for a fair difference of opinion concerning the power and authority intended to be conferred upon the common pleas by the act under consideration. The learned president judge of the court below evidently realized this, and so phrased his final decree that the question should be squarely presented to us for review. The decree itself states that "the words 'right of appeal' from the decision of the board of censors to the court of common pleas, under the act, \* \* \* mean that the whole matter of the approval or disapproval of films or portions thereof is before the court de novo, and the whole

\* See *Ma-King Products Co. v. Blair*, 271 U. S. 479, 46 S. Ct. 544, 70 L. Ed. 1046 (1926), and note, 21 Ill. Law Rev. 378.

matter is to be examined and tried as if it had not been tried before." Moreover, the court certifies that, following the view just stated, "the films complained of were thrown upon a screen and seen and examined" by it, and thereupon it determined the objections of the censors to be "without merit." There is no finding, or even suggestion, that the censors acted arbitrarily or were guilty of an abuse of discretion in ordering the eliminations in question, and the appellants contend that, in the absence of such findings, the order of the court below must be reversed.

Since there is nothing said in the act of 1915, *supra*, upon the subject of an appeal from the common pleas, we are met at the threshold of this inquiry with the question of our own jurisdiction. It is well established, however, that when a new power is conferred upon a court of *nisi prius*, to be exercised in a summary method or in a way different from the common law, the right of review by this court, on *certiorari*, follows as a matter of course. *Buckmyer v. Dubbs*, 5 Bin. 29; *Northampton County Commissioners' Appeal*, 57 Pa. 452; *In re Diamond St.*, 196 Pa. 254, 46 A. 428. It is further established that, while on *certiorari* we cannot review the merits, yet, "We are entitled to inspect the whole record with regard to the regularity and propriety of the proceedings to ascertain whether the court below exceeded its jurisdiction or its proper legal discretion. *Robb's Nomination Certificate*, 188 Pa. 212 [41 A. 477]."

The above quotation is taken from the opinion of Mr. Chief Justice Mitchell in *Independence Party Nomination*, 208 Pa. 108, 111, 57 A. 344, 345, where we further said: "As a general rule, the opinion of the court is not part of the record, strictly so called, and in common-law actions the review on *certiorari* is confined to the judgment without reference to the reasons of the court in entering it. In equity suits the rule is the other way, and the reasons and opinion of the chancellor are always open to examination to discover the grounds of his action. Proceedings on summary petition like the present occupy a middle ground. They are not open to review on the merits; \* \* \* but as a mere inspection of the docket entries or the formal proceedings would disclose nothing, we must look at the opinion as well as the action of the court to see the basis on which it acted." See, also, *Foy's Election*, 228 Pa. 14, 76 A. 713.

The principles just stated constitute our guide in this case. At the present time, in our law, the word "appeal" has no conclusive meaning, for since the act of May 9, 1889 (P. L. 158), a writ of error and a *certiorari*, as well as an appeal proper, are all designated "appeals." *In re Diamond St.*, *supra*. Therefore it is necessary in each instance to look at the particular act of assembly giving the right of appeal to determine just what powers are to be exercised by the appellate court. In this connection a careful reading of the statute here in question convinces us it was never contemplated that the courts of common pleas were to be constantly called upon to permit moving picture reels



to be reproduced before them, and sit as supercensors thereof, in order to review the decisions of the administrative body created by the act. The evident intent was to grant a right of appeal to the common pleas so that tribunal could correct any arbitrary or oppressive orders which the board of censors might make, and nothing more; in other words, that the court might reverse the censors when the latter were guilty of an abuse of discretion. This is the ordinary rule to which, on appeal, even this court restricts itself in reviewing an exercise of discretion, particularly of administrative officials.

We do not mean to say that the common pleas may not view eliminated pictures, when necessary so to do in order properly to comprehend the matter before them; but such inspection should never be resorted to unless, in their opinion, the ordinary methods of proof are inadequate. When, after hearing, the court is convinced in any case that the censors have abused their discretion, the construction just placed upon the act of 1915, *supra*, leaves ample power in the common pleas to see that the public is not denied proper entertainment, and to protect property rights, a power which they should not hesitate to use when occasion requires.

It is now established beyond controversy that the Legislature may create an administrative body with discretion and authority to determine facts (*Buffalo Branch, Mutual Film Corporation, v. Breiting*, 250 Pa. 225, 234-243, 95 A. 433), and, under the act of 1915, *supra*, every order for an elimination made by the board of censors necessarily comprehends a finding that the picture in question is "sacrilegious, obscene, indecent, or immoral," and, as such, tends to "debase or corrupt morals." Of course, on this appeal, we do not go back of the ultimate findings stated by the court below as immediately supporting the decree brought to us by the certiorari; but, as already pointed out, while that tribunal thought the action of the board "minute and far-fetched," and "without merit," yet it did not find the censors were guilty of an arbitrary or oppressive abuse of discretion, and, in the absence of such a determination, the order complained of cannot stand.

The several assignments of error are sustained, and the order is reversed.<sup>6</sup>

<sup>6</sup> See, also, *Hunstiger v. Kilian*, 130 Minn. 474, 153 N. W. 869 (1915).

As to pleadings on appeal: "After due notice a hearing was had before the state board, which resulted in a revocation of Seitz's certificate to practice medicine in this state. From that order an appeal was taken to the common pleas court of Scioto county, and that court, after a hearing, likewise entered an order revoking the certificate, and from that judgment error is now prosecuted to this court. In the common pleas a motion was filed by Seitz prior to the trial to require the medical board to file a petition setting forth the issues upon which the case was to be tried. This motion was overruled, which forms the basis of one of the complaints of the plaintiff in error in this court. There was no error in overruling this motion. The statute authorizes no pleadings, but contemplates that the case on appeal in the common pleas shall be heard upon the issues raised before the state medical board. This is no novelty in practice. Appeals from administrative boards to judicial tribunals have long been entertained in this state, and, so far as we know, uniformly with no new

## SECTION 52.—DEFENSE TO ENFORCEMENT PROCEEDINGS

## FIRE DEPARTMENT OF CITY OF NEW YORK v. GILMOUR.

Court of Appeals of New York, 1896. 149 N. Y. 453, 44 N. E. 177, 52 Am. St. Rep. 748.

Appeal from Common Pleas of New York City and County, General Term.

Action by the Fire Department of the City of New York against John Gilmour to recover penalty imposed for refusal to obey an order of the board of fire commissioners. There was judgment for plaintiff, which was reversed by the General Term (4 Misc. Rep. 202, 23 N. Y. Supp. 1022), and from the order of reversal plaintiff appeals. Affirmed.

This action was brought in a district court in the city of New York, to recover of the defendant a penalty of \$25 for neglect on his part to obey an order dated May 21, 1892, purporting to have been made under the authority of the board of commissioners of the fire department of the city of New York, requiring him, within five days from the service of the order, to build a wall of stone, brick, or other fire-proof material, not more than 18 feet in height, around the yard of premises 87 White street, in the city of New York, in rear of the building thereon, and prohibiting him from storing in the yard boxes of wood to a height above a point 12 inches below the top of the wall. The defendant occupied the building and yard 87 White street, using the yard (a space about 60 by 35 feet) for the storing of pack-

pleadings in the judicial tribunal. That is the practice under section 2461, General Code, where appeals are taken from the decisions of the county commissioners, and it is a like proceeding under some of the provisions relating to public roads, where appeals are taken from the county commissioners to the probate court." *Seitz v. Ohio State Medical Board*, 24 Ohio App. 154, 157 N. E. 304 (1926).

As to whether the provision by statute for an appeal excludes other remedies, and especially also whether it prevents defects of administrative action to be availed of by way of defense to proceedings brought on behalf of the public against the individual, see *Governors of Bristol Poor v. Wait*, 1 Ad. & El. 264 (1834); *Allen v. Sharp*, 2 Exch. 352 (1848); *Clinkenbeard v. United States*, 21 Wall. 65, 22 L. Ed. 477 (1874).

See, for application of statutory right of appeal, the following cases in this collection: *Gross' License*, 161 Pa. 344, 29 A. 25 (1894); *Whitely v. Platte Co.*, 73 Mo. 30 (1880); *Fuller v. Colfax Co. (C. C.)* 14 F. 177 (1882); *Lillienfeld's Case*, 92 Va. 818, 23 S. E. 882 (1896); *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cas. (N. Y.) 107 (1799); *Chicago & N. W. R. Co. v. Railroad Commission*, 156 Wis. 47, 145 N. W. 216, 974 (1914); *Stock v. Central Midwives Board*, [1915] 3 K. B. 756; *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 40 S. Ct. 527, 64 L. Ed. 908 (1920).

ing boxes manufactured by him at another place, and had so used the yard for a period of about 14 years. The boxes were piled at times as high as 20 to 30 feet.

The order contains a recital that the packing boxes so stored were combustible, and were kept and stored in such quantity as to be dangerous, "and the same is considered dangerous in causing and promoting fires, and prejudicial to the safety of life and property, and in its present condition a violation of law." The order refers to chapter 410 of the Laws of 1882 (Consolidation Act) as the basis of the order. By section 463 of that act, the board of fire commissioners, and its officers and agents under their direction, or the direction of either of the commissioners, are empowered to "enter any building or premises where any merchandise, gunpowder, firewood, boards, shingles, shavings," etc., "or other combustible materials may be lodged, and upon finding that any of them are defective or dangerous, or that a violation of this title exists therein, may deliver a written or printed notice containing an extract from this title of the provisions in reference thereto, and notice of any violation thereof, and notice to remove, amend or secure the same within a period to be fixed therein." The section proceeds to declare that, in case of neglect or refusal on the part of the occupant or of the possessor of such combustible materials "so to remove or amend or secure the same within the time and in the manner directed by the said commissioners in such notice, the party offending shall forfeit and pay, in addition to any penalty otherwise imposed, the sum of twenty-five dollars, and the further sum of five dollars for each day's neglect," etc. Attached to the notice and order served on the defendant was a copy of section 463, and also of section 467 of the act.

The surveyor of combustibles was the only witness sworn on the trial. He testified that he made an inspection of 87 White street, and was directed, before going there, to report against the place "if they did not have a proper wall around it, and a large number of boxes were stored there." He made the report, and the order was thereupon issued. The defendant sought to show by the witness facts bearing upon the condition of the premises, their surroundings, and the absence of danger or conflagration from the boxes piled in the yard. Most of the questions put to the witness bearing upon the question of the propriety or reasonableness of the order were excluded by the justice, on the ground that the court could not consider the matter. The defendant, on the conclusion of the plaintiff's case, offered to prove by two witnesses a variety of facts which were enumerated, bearing upon the question of the reasonableness of the order, and to show that the use made by him of the premises did not involve any danger of fire beyond the ordinary danger attending the ordinary uses of property. The justice refused to hear the evidence, saying "the question before the court is, has there been a refusal to comply with the order of the board? The court regrets



that it cannot go into the question whether the order was necessary, or whether the department acted properly." The court rendered judgment for the plaintiff for the penalty given by statute, which was reversed on appeal to the General Term of the New York Common Pleas, and from the order of reversal the plaintiff brings this appeal.

ANDREWS, C. J. (after stating the facts). The action was tried and determined by the justice of the district court upon the theory that the determination of the board of fire commissioners that the use made by the defendant of the yard of his premises for the piling of boxes was dangerous, as being likely to cause or promote a conflagration, to the prejudice of life and property, was conclusive, and not open to inquiry in an action brought for the penalty, given by section 463 of the consolidation act. It was upon this view of the law that the justice excluded the evidence offered by the defendant to show that, in fact, the use made by him of the yard did not involve any unusual risk of fire, either from the inherent nature of the property stored therein, or in promoting a conflagration originating on adjacent premises. This, the justice declared, he could not consider, but was confined to the simple inquiry whether the order of the board of commissioners had been disobeyed.

We think the justice erred in the principle upon which he proceeded. There can be no doubt of the power of the Legislature to enact regulations for the protection of cities or villages against the serious dangers from conflagrations. It is one of the subjects to which the police power of the state extends, and there is no one in the wide range of this power upon which the Legislature has more frequently acted. It may directly enact a code of regulations applicable to exposed localities, or, as is more commonly done, it may invest municipalities with the power to pass ordinances regulating the subject. The authority given in most charters of municipalities to the legislative body to fix fire limits, to prohibit the erection of buildings therein of wood or other combustible materials, the storing of gunpowder or other explosive compounds in quantities and under circumstances hazardous to life and property, are among the familiar instances of the delegated power. Regulations on this subject are restrictions of personal freedom and the free use of property. But they are justified by public necessity, and so are within the acknowledged power of the Legislature.

The Legislature, by section 463 of the consolidation act, conferred upon a subordinate department of the city government the power to determine in specific cases whether the use of property for storage of combustible materials by the owner or occupant was a menace to the public safety, and, upon the determination of the board of commissioners that such use was dangerous, authorized an order to be made by the board for the discontinuance of such use or the regulation thereof, upon disobedience to which the owner or occupant is subjected to a penalty. It is manifest that if an irreviewable discre-

tion is thereby lodged in the board, and the citizen is precluded in a suit for the penalty from contesting the reasonableness of an order made, the board is vested with a power of the most arbitrary description, liable to great abuse—a power which, though in terms vested in the board of commissioners, is, sometimes at least, as the evidence in this case shows, in fact wielded by the subordinate appointees in the name of the department. It would have been competent for the Legislature to have enacted a general regulation prohibiting the piling of boxes or masses of combustible material in yards or open spaces in the populous and defined districts within a city, and such an enactment every citizen would be bound to obey; and, where sued for a penalty, it would be no defense to a party who had violated the law to show that in his particular case, owing to exceptional circumstances, the regulation was unnecessary or unreasonable.

The will of the Legislature would stand as the reason for the rule, and, being general, no one, however situated, could escape its obligation, unless, indeed, he could establish that, passing beyond the police power, it involved some right of person or property protected by the Constitution. In other words, where the Legislature, in the exercise of the police power, enacts a regulation defining the duty of citizens, either in respect to their personal conduct or the use of their property, the reasonableness of the thing enjoined or prohibited is not an open question, because the supreme legislative power has determined it by enacting the rule. See *Dill. Mun. Corp.* § 328, and cases cited. But where the Legislature, as in the present case, enacts no general rule of conduct, but invests a subordinate board with the power to investigate and determine the fact whether, in any special case, any use is made of property for purposes of storage, dangerous on account of its liability to originate or extend a conflagration, not prescribing the uses which it permits or disallows, then we are of opinion that in such cases the reasonableness of the determination of the board, or of the order prohibiting a particular use, in accordance with such determination, is open to contestation by the party affected thereby, and that he is entitled when sued for a disobedience of the order, to show that it was unreasonable, unnecessary, and oppressive. \* \* \* It was not necessary in this case that the defendant should have been notified (as he was not) of the investigation made of his premises by the appointees of the fire commissioners, or that he should have been afforded an opportunity to be heard before the order was made. *Health Department of City of New York v. Rector, etc., of Trinity Church*, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579. But we think he was entitled to contest, in the action for the penalty, the reasonableness of the order made and the facts upon which it proceeded. *People v. Board of Health of City of Yonkers*, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522; *Health Department of City of New York v. Rec-*

tor; etc., of Trinity Church, *supra*; City of Salem v. Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650.

For the denial of this right, we think the judgment should be affirmed. All concur.

Judgment affirmed.

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STEVENS v. CASEY, State Inspector of Buildings.

Supreme Judicial Court of Massachusetts, 1917. 228 Mass. 368, 117 N. E. 588.

RUGG, C. J. It is provided by St. 1913, c. 655, § 20, that:

"A building which is used, in whole or in part, as a \* \* \* tenement house which has eight or more rooms or in which ten or more persons are accommodated or lodge or reside above the second story, the owner \* \* \* of which is notified in writing by an inspector that the provisions of this act are deemed by him applicable thereto, shall be provided with proper egresses or other means of escape from fire, sufficient for the use of all persons accommodated \* \* \* lodged or resident therein; but no owner \* \* \* of such building shall be deemed to have violated this provision unless he has been notified in writing by such inspector what additional egresses or means of escape from fire are necessary."

The plaintiff, being the owner of a certain building in Worcester, was notified by an inspector according to the statute that additional means of egress and other means of escape from fire were required by him under the authority of this statute the details of which were specified. Thereupon the plaintiff brought this proceeding under section 55, which provides that:

"Whoever is aggrieved by the order, requirement, or direction of a building inspector \* \* \* may \* \* \* appeal to a judge of the superior court \* \* \* for an order forbidding its enforcement; and \* \* \* a hearing may be had before the court at such early and convenient time and place as shall be fixed \* \* \* or the court may appoint three disinterested persons \* \* \* to examine the matter and hear the parties; and the decision of said court or the decision, in writing and under oath, of a majority of said experts \* \* \* may alter, annul or affirm such order, requirement or direction."

Assuming in favor of the plaintiff (but without so deciding) that this is a "civil cause" within R. L. c. 173, § 106, so that it may be brought here by exceptions, it does not appear that any wrong has been done to the landowner.

The statute was enacted as a police regulation for the protection from fire of the lives of human beings. Statutes of this general nature are within the constitutional power of the Legislature. The housing of large numbers of people in populous cities not adequately protected against fire risk has direct relation to the public health and



public safety. *Salem v. Maynes*, 123 Mass. 372; *Perry v. Bangs*, 161 Mass. 38, 36 N. E. 683; *Commonwealth v. Hayden*, 211 Mass. 296, 97 N. E. 783; *Goldstein v. Connor*, 212 Mass. 57, 98 N. E. 701.

The initial decision of an inspector made under the statute, as to the kind of building which is in controversy, is not binding upon the owner as a finality under all circumstances: *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850; *No. American Cold Storage Co. v. Chicago*, 211 U. S. 306, 29 S. Ct. 101, 53 L. Ed. 195. But the statute makes provision for a petition by the landowner for a review by the court or by three experts appointed by the court of the decision of the inspector. It is by virtue of that provision that the present landowner has had the decision of the inspector reviewed by the superior court. He cannot avail himself of that review and at the same time ask this court to strike down the statute as unconstitutional because it does not enable him to demand a trial by jury. *Pitkin v. Springfield*, 112 Mass. 509; *N. Y. Life Ins. Co. v. Hardison*, 199 Mass. 190, 85 N. E. 410, 127 Am. St. Rep. 478. Doubtless if the landowner had not sought a review by the superior court of the action of the inspector in accordance with the terms of the statute, he would have a right to a trial by jury as to the existence of the fundamental facts upon which the jurisdiction of the inspector rested, when a criminal prosecution or proceedings in equity were instituted against him for failure to comply with the requirements imposed by the inspector. Whether he may have such trial by jury after having availed himself of the hearing in court furnished by the statute is a question not now before us. But it is plain that, when appearing in court as a party plaintiff by the favor of the statute, he cannot at the same time invoke protection from the court against the entire proceeding, because he is not afforded a trial by jury as to the existence of the fundamental fact which gives the inspector jurisdiction. If he takes advantage of the protection given by the statute for a review by or under the direction of the court of all determinations made by the inspector, he can enjoy that protection only upon the terms set out in the statute. \* \* \*

<sup>8</sup> See, also, *Harrington v. Glidden*, 179 Mass. 486, 61 N. E. 54, 94 Am. St. Rep. 613 (1901), post, p. 652.

The following other cases in his collection are cases of defence to enforcement proceedings: *Galbraith v. Littlech*, 73 Ill. 209 (1874); *Nealy v. Brown*, 6 Ill. 10 (1844); *State v. Weimer*, 64 Iowa, 243, 20 N. W. 171 (1884); *People v. Hopson*, 1 Denio (N. Y.) 574 (1845); *Hagar v. Reclamation District*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569 (1884); *Waye v. Thompson*, L. R. 15 Q. B. 342 (1885); *Philadelphia v. Scott*, 81 Pa. 80, 22 Am. Rep. 738 (1876); *Metro-politan Board of Health v. Heister*, 37 N. Y. 661 (1868); *People v. McCoy*, 125 Ill. 289, 17 N. E. 786 (1888); *State v. Lamos*, 26 Me. 258 (1846); *State v. Kansas Central R. Co.*, 47 Kan. 497, 28 Pac. 208 (1891); *McLean v. Jephson*, 123 N. Y. 142, 25 N. E. 409, 9 L. R. A. 493 (1890); *Spencer & Gardner v. People*, 68 Ill. 510 (1873); *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414 (1897); *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 44 S. Ct. 336, 68 L. Ed. 696, 32 A. L. R. 78 (1924); *Village of Bellwood v. Galt*, 321 Ill. 504, 152 N. E. 59 (1926).

## CHAPTER 13

REMEDIAL SYSTEM IN THE FEDERAL  
ADMINISTRATION<sup>1</sup>

## SECTION 53.—LIABILITY OF OFFICERS

## TRACY v. SWARTWOUT.

Supreme Court of United States, 1836. 10 Pet. 80, 9 L. Ed. 354.

Error to the Circuit Court for the Southern District of New York.

This action was commenced by the plaintiffs in error, in the Superior Court of the City of New York, and on the suggestion of the defendant that the suit was instituted against him for acts done by him under the revenue laws, as collector for the district of the city of New York, and praying that the same should be removed to the Circuit Court of the United States for the Southern District of New York, the cause was so removed to October term, 1833.

The declaration was in trover for certain casks of syrup of sugar cane. \* \* \*

McLEAN, Justice, delivered the opinion of the court.

This case was brought into this court by a writ of error to the Circuit Court of the Southern District of New York. The suit was prosecuted in that court, to recover damages from the defendant, who, as collector of the customs, had refused to allow the plaintiffs to enter and receive the payment of the lawful duties, on certain casks of syrup of sugar cane, which they had imported into the port of New York. It is admitted that the law imposed no more duty on the article than fifteen per cent. ad valorem, although the collector, acting under the instructions of the Secretary of the Treasury, required bond for the payment of the above duty, or, should it be required, a duty of three cents per pound. No bond was given, and the syrup remained in the possession of the collector for a long time, by which means its value was greatly deteriorated. The question for consideration arises out of a bill of exceptions in which the evidence is stated at large, showing the quality of the syrup, the number of gallons imported, and the refusal of the defendant to take bond for the fifteen per cent. ad valorem duty.

It was admitted by the counsel of the plaintiffs that the defendant acted throughout with entire good faith, and under instructions from

<sup>1</sup> See, also, *supra*, section 34, Action against State or Government; section 42, Habeas Corpus; section 48, Injunction as Substitute for Mandamus; and chapter 12, Appeal to Court.

the Treasury Department. The plaintiffs' counsel offered to prove that they were unable to give bonds for duties at three cents per pound, though they did not state that fact to the defendant at the time they offered to make the entry. The court overruled this testimony, and instructed the jury "that, admitting the merchandise in question was only subject to an ad valorem duty of fifteen per cent., yet the circumstances under which the dispute about the rate of duties arose ought not to subject the collector to the payment of more than nominal damages; that the collector was pursuing what he believed to be the true construction of the law, and whatever injury the plaintiffs may have sustained, in not receiving their goods at an earlier day, grew out of their own conduct in not entering the goods in the manner offered by the collector, at fifteen per cent. ad valorem, taking the bond, however, to receive the payment of three cents per pound, if such should be the legal rate of duties demandable, merely placing the case in a situation to have the question judicially decided, as to the rate of duty, no intimation, at the time, being given that it would occasion any inconvenience to the plaintiffs to give the bond so required by the collector." Under this construction, the jury found a verdict for six cents damages and six cents costs.

There can be no doubt that the Circuit Court decided correctly in overruling the evidence of inability in the plaintiffs to give the bond demanded by the defendant. The materiality of this evidence is not perceived; and if it had been material it ought not have been received, unless the fact of inability had been made known to the defendant, at the time the bond was required. \* \* \*

The collector of the customs is a ministerial officer. He acts under the instructions of the Secretary of the Treasury, who is expressly authorized to give instructions, as to the due enforcement of the revenue laws. Do these instructions, when not given in accordance with the law, afford a justification to the collector, or exonerate him from the payment of adequate damages for an injury resulting from his illegal acts? The Circuit Court, in their charge to the jury, did not consider these instructions as a justification to the defendant; and in this they were unquestionably correct. The Secretary of the Treasury is bound by the law; and although, in the exercise of his discretion, he may adopt necessary forms and modes of giving effect to the law, yet neither he nor those who act under him can dispense with, or alter, any of its provisions. It would be a most dangerous principle to establish that the acts of a ministerial officer, when done in good faith, however injurious to private rights and unsupported by law, should afford no ground for legal redress. The facts of the case under consideration will forcibly illustrate this principle. The importers offer to comply with the law, by giving bond for the lawful rate of duties; but the collector demands a bond in a greater amount than the full value of the cargo. The bond is not given, and the property is lost, or its value greatly reduced, in the hands of the defendant. Where a ministerial officer acts in good faith, for an in-



jury done, he is not liable to exemplary damages; but he can claim no further exemption where his acts are clearly against law. The collector has a right to hold possession of imported goods until the duties are paid or secured to be paid, as the law requires. But, if he shall retain possession of the goods, and refuse to deliver them, after the duties shall be paid, or bond given or tendered, for the proper rate of duties, he is liable for the damages which may be sustained by this refusal. \* \* \*

Some personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship. The judgment of the Circuit Court must be reversed, and the cause remanded to that court for further proceedings.

Judgment reversed.<sup>2</sup>

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### ELLIOTT v. SWARTWOUT.

Supreme Court of United States, 1836. 10 Pet. 137, 9 L. Ed. 373.

Certificate of division from the Circuit Court for the Southern District of New York.

The suit was originally instituted in the Superior Court of the City of New York, by the plaintiff against the defendant, the collector of the port of New York, and was removed by certiorari into the Circuit Court of the United States.

The action was assumpsit, to recover from the defendant the sum of \$3,178, received by him for duties, as collector of the port of New York, on an importation of worsted shawls with cotton borders, and worsted suspenders with cotton straps or ends. The duty was levied at the rate of fifty per centum ad valorem, under the second clause of the second section of the act of the 14th July, 1832, entitled "An act to alter and amend the several acts imposing duties on imports," as manufactures of wool, or of which wool is a component part. The plea of non assumpsit was pleaded by the defendant in bar of the action.

The following points were presented, during the progress of the trial, for the opinion of the judges, and on which the judges were opposed in opinion.<sup>3</sup>

3. Whether the collector is personally liable in an action to recover back an excess of duties paid to him as collector, and by him paid, in the regular and ordinary course of his duty, into the treasury

<sup>2</sup> Compare *Averill v. Smith*, 17 Wall. 82, 21 L. Ed. 613 (1872).

<sup>3</sup> The first two points, and the part of the opinion relating thereto, are omitted.

of the United States, he, the collector, acting in good faith, and under instructions from the Treasury Department; a notice having been given, at the time of payment, that the duties were charged too high, and that the party paying, so paid to get possession of his goods, and intended to sue to recover back the amount erroneously paid, and a notice not to pay over the amount into the treasury. These several points of disagreement were certified to this court by the direction of the judges of the Circuit Court.

THOMPSON, J., delivered the opinion of the court. \* \* \*

3. The case put by the third point is where, at the time of payment, notice is given to the collector that the duties are charged too high, and that the party paying so paid to get possession of his goods, and accompanied by a declaration to the collector that he intended to sue him to recover back the amount erroneously paid, and notice given to him not to pay it over to the treasury. This question must be answered in the affirmative, unless the broad proposition can be maintained that no action will lie against a collector to recover back an excess of duties paid him, but that recourse must be had to the government for redress. Such a principle would be carrying an exemption to a public officer beyond any protection sanctioned by any principles of law or sound public policy. The case of *Irving v. Wilson and Another*, 4 T. R. 485, was an action for money had and received, against custom-house officers, to recover back money paid to obtain the release and discharge of goods seized, that were not liable to seizure, and the action was sustained. Lord Kenyon observed that the revenue laws ought not to be made the means of oppressing the subject, that the seizure was illegal, that the defendants took the money under circumstances which could by no possibility justify them, and therefore this could not be called a voluntary payment.

The case of *Greenway v. Hurd*, 4 T. R. 554, was an action against an excise officer, to recover back duties illegally received; and Lord Kenyon does say that an action for money had and received will not lie against a known agent, but the party must resort to the superior. But this was evidently considered a case of voluntary payment. The plaintiff had once refused to pay, but afterwards paid the money; and this circumstance is expressly referred to by Buller, Justice, as fixing the character of the payment. He says, though the plaintiff had once objected to pay the money, he seemed afterwards to waive the objection, by paying it. And Lord Kenyon considered the case as falling within the principle of *Sadler v. Evans*, 4 Burr. 1984, which has already been noticed. In the case of *Snowden v. Davis*, 1 Taunt. 358, it was decided that an action for money had and received would lie against a bailiff, to recover back money paid through compulsion, under color of process, by an excess of authority, although the money had been paid over. The court say the money was paid to [by] the plaintiff, under the threat of a distress;

and although paid over to the sheriff, and by him into the exchequer, the action well lies. The plaintiff paid it under terror of process, to redeem his goods, and not with intent that it should be paid over to any one.

The case of *Ripley v. Gelston*, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271, was a suit against a collector to recover back a sum of money demanded by him for the clearance of a vessel. The plaintiff objected to the payment as being illegal, but paid it for the purpose of obtaining the clearance, and the money had been paid by the collector into the Branch Bank, to the credit of the Treasurer. The defense was put on the ground that the money had been paid over, but this was held insufficient. The money, say the court, was demanded as a condition of the clearance; and that being established, the plaintiff is entitled to recover it back, without showing any notice not to pay it over. The cases which exempt an agent do not apply. The money was paid by compulsion. It was extorted as a condition of giving a clearance, and not with intent or purpose to be paid over. In the case of *Clinton v. Strong*, 9 Johns. (N. Y.) 370, the action was to recover back certain costs, which the marshal had demanded, on delivering up a vessel which had been seized, which costs the court considered illegal; and one of the questions was whether the payment was voluntary. The court said the payment could not be voluntary; the costs were exacted by the officer, *colore officii*, as a condition of the redelivery of the property; and that it would lead to the greatest abuse to hold that a payment, under such circumstances, was a voluntary payment, precluding the party from contesting it afterwards. The case of *Hearsey v. Pruyn*, 7 Johns. (N. Y.) 179, was an action to recover back toll which had been illegally demanded; and Spencer, Justice, in delivering the opinion of the court, says the law is well settled that an action may be sustained against an agent, who has received money to which the principal had no right, if the agent has had notice not to pay it over. And in the case of *Frye v. Lockwood*, 4 Cow. (N. Y.) 456, the court adopts the principle that when money is paid to an agent, for the purpose of being paid over to his principal, and is actually paid over, no suit will lie against the agent to recover it back. But the distinction taken in the case of *Ripley v. Gelston* is recognized and adopted, that the cases which exempt an agent, when the money is paid over to his principal without notice, do not apply to cases where the money is paid by compulsion, or extorted as a condition, etc.

From this view of the cases, it may be assumed as the settled doctrine of the law that, where money is illegally demanded and received by an agent, he cannot exonerate himself from personal responsibility by paying it over to his principal, if he has had notice not to pay it over. The answer, therefore, to the third point, must be that the collector is personally liable to an action to recover back



an excess of duties paid to him as collector, under the circumstances stated in the point, although he may have paid over the money into the treasury. \* \* \*

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### ACT OF CONGRESS MARCH 3, 1839.

5 Stat. 348, c. 82, § 2.

That from and after the passage of this act, all money paid to any collector of the customs, or to any person acting as such, for unascertained duties, or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the Treasurer of the United States, kept and disposed of as all other money paid for duties is required by law, or by regulation of the Treasury Department, to be placed to the credit of the Treasurer, kept and disposed of; and it shall not be held by said collector or person acting as such, to await any ascertainment of duties, or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectible in any case where money is so paid; but whenever it shall be shown to the satisfaction of the Secretary of the Treasury, that in any case of unascertained duties, or duties paid under protest, more money has been paid to the collector, or to the person acting as such, than the law requires should have been paid, it shall be his duty to draw his warrant upon the Treasurer in favor of the person or persons entitled to the overpayment, directing the said Treasurer to refund the same out of any money in the treasury not otherwise appropriated.

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### ARNSON v. MURPHY.

Supreme Court of United States, 1883. 109 U. S. 238, 3 S. Ct. 184, 27 L. Ed. 920.

Mr. Justice MATTHEWS. \* \* \* The common-law right of action to recover back money illegally exacted by a collector of customs as duties upon imported merchandise rested upon the implied promise of the collector to refund money which he had received as the agent of the government, but which the law had not authorized him to exact, which had been unwillingly paid, and which, before payment to his principal, he had been notified he would be required to repay, and involved a corresponding right on his part to withhold from the government, as an indemnity, the fund in dispute. The manifest public inconveniences resulting from this situation induced Congress, by Act March 3, 1839, c. 82, 5 Stat. 348, § 2, to alter the relation between these officers and the United States by requiring them peremptorily to pay into the treasury all moneys received by them officially, without regard to claims for erroneous and illegal exactions. It was provided, however, therein, that the Secretary of the Treasury himself,

on being satisfied that, in any case of duties paid under protest, more money had been paid to the collector than the law required, should refund the excess out of the treasury. The legal effect of this enactment, as was held in *Cary v. Curtis*, 3 How. 236, 11 L. Ed. 576, was to take from the claimant all right of action against the collector, by removing the ground on which the implied promise rested. Congress, being in session at the time that decision was announced, passed the explanatory act of February 26, 1845, which, by legislative construction of the act of 1839, restored to the claimant his right of action against the collector, but required the protest to be made in writing at the time of payment of the duties alleged to have been illegally exacted, and took from the Secretary of the Treasury the authority to refund conferred by the act of 1839. 5 Stat. 349, 727. This act of 1845 was in force, as was decided in *Barney v. Watson*, 92 U. S. 449, 23 L. Ed. 730, until repealed by implication by Act June 30, 1864, 13 Stat. 214. The fourteenth section of the act last mentioned is, as already cited, in substance the present section 2931 of the Revised Statutes, providing for the appeal to the Secretary of the Treasury, and the sixteenth section, being the present section 3012½, Rev. St., restores to the Secretary of the Treasury the authority to refund moneys paid under protest and appeal, which he shall be satisfied were illegally exacted, originally conferred upon him by the act of 1839. And the provision of the act of 1845, which construed the act of 1839 so as to restore to the claimant the right of action, judicially declared in *Cary v. Curtis*, supra, to have been taken away by the latter, now appears as section 3011 of the Revised Statutes. It was in force when the present action was brought, and is as follows: "Any person who shall have made payment under protest and in order to obtain possession of merchandise imported for him, to any collector or person acting as collector of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty-one." \* \* \*

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KINGS CO. SAV. INST. v. BLAIR, Adm'r, etc.

Supreme Court of the United States, 1886. 116 U. S. 200, 6 S. Ct. 353, 29 L. Ed. 657.

WOODS, J. The Kings County Savings Institution, plaintiff in error, was the plaintiff in the circuit court. It brought its action, as for money had and received, against the defendant in error, as administrator of the estate of James Freeland, deceased, late collector of internal revenue, to recover the amount of taxes illegally exacted from

it, as it alleged, by the intestate of the defendant in error. The defense relied on was pleaded by the defendant, as follows: "That the plaintiff herein did not present to the commissioner of internal revenue its alleged claim for abatement, or for refunding the amount claimed in said complaint, within two years after the said alleged claim had accrued, as required by section 3228 of the Revised Statutes of the United States."

The bill of exceptions shows that, on the trial of the case by the circuit judge and a jury, the plaintiff, to sustain the issue on its part, proved that it made its return for internal revenue taxation for the six months ending May 31, 1878, on the form prescribed by the commissioner of internal revenue, in duplicate, and, accompanying the same, filed an amended return in duplicate. The prescribed return had the following words written upon its face: "This return, not exempting any part of accounts exceeding \$2,000 in the name of any one person, is made under protest, by compulsion, to prevent a penalty from being assessed; but the accompanying is claimed to be the true and legal return exempting \$2,000 of all deposits made in the name of any one person; and if the assessment and collection are enforced in accordance with this return, suit will be brought for the excess." The amended return showed the tax due according to the construction placed upon the law by the plaintiff, to be \$428.75, and had the following words written upon its face: "In this amended return this savings bank, under advice of counsel, disregards as erroneous this printed form heretofore prescribed and enforced by the commissioner and collector of internal revenue for the United States, and the amended exemption clause, 'less average amount of all deposits not exceeding \$2,000 made in the name of any one person,' is construed as exempting 'all deposits made in the name of any one person not exceeding \$2,000' of such deposit in his name. This bank claims that the tax be assessed according to this return."

It was shown that the prescribed return and amended return were delivered to the commissioner of internal revenue on June 6, 1878, and to the collector of internal revenue, the intestate of the defendant, on or before that date. On June 18, 1878, the commissioner of internal revenue assessed the amount of tax, on the face of said prescribed return, at \$1,796.25, which amount the plaintiff paid to the collector on July 1, 1878, by a check, which bore upon its face the words, "Paid, under protest, to prevent distraint and penalty."

The bill of exceptions recites that the "plaintiff also proved that, as a matter of fact, the true amount of the tax which should have been assessed against it was the sum of \$428.75, as shown by said amended return." Proof of similar facts, in respect to the tax due from the plaintiff for the six months ending November 30, 1878, was made, and that both the prescribed and amended returns for that tax were delivered to the commissioner of internal revenue on December 9, 1878, and to the collector on or before that date. The plaintiff ad-



mitted that no other proceedings had been taken than those above detailed. The defendant, to sustain the issue on his part, "proved," so the bill of exceptions states, "that for two years subsequent to the payments of the amounts assessed against the plaintiff, respectively, no appeal had been taken from such payments, or claim made for refund to the commissioner of internal revenue." He also put in evidence the treasury regulations prescribing the forms and procedure for the refunding of taxes in force from January 1, 1871, to December 31, 1878, as follows:

"Preparations of claims for the refunding of taxes and penalties claimed to have been erroneously or illegally collected.

"[Form 46.]

"Claims for the refunding of taxes and penalties alleged to have been erroneously or illegally collected must be made out upon form 46 in this case. The burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. The claim should be still further supported by the certificate of the assistant assessor of the proper division, and by the certificate of the assessor and collector. This form and those certificates should be, respectively, in form as follows."

Then follows the form of an affidavit to be made by the claimant, which, if observed, required him to state the business in which he was engaged, when and by what assessor he was assessed, the amount of the tax, and when he paid it, and to what collector, and that, in the belief of the claimant, the tax was erroneous and improper, and for what reasons, and that by reason of the erroneous assessment and payment he was justly entitled to have a certain sum, naming it, refunded, and that he had not theretofore presented any claim for the refunding of said sum, or any part of it. Then follows the form of the deputy collector's certificate to be indorsed on the claimant's affidavit, to the effect that he had carefully investigated the facts set out in the affidavit, and believed the statements in all respects to be true. Next follows the form of the collector's certificate, also to be indorsed on the affidavit, to the effect that he had carefully investigated the facts therein set forth and was satisfied that its statements were in all respects just and true; that upon personal examination he found a certain sum, naming the amount, reported against the claimant, giving the page and line of the list and the number and date of the form where it was to be found, and that the same was paid to him on a day named, and was included in his aggregate receipts for said list, which receipts amounted to a certain sum, naming it; and that the same was delivered to the assessor, to be transmitted to the commissioner of internal revenue, and that no claim for the assessment complained of had been theretofore presented. The certificate of the clerk in charge of records in the office of the commissioner of internal revenue was also required, to the effect that from personal examination he found a certain sum, naming it, re-

ported against the claimant, on a certain page and line, naming them, of the list in form, giving the number and date of the form, on file in the office of the commissioner, and that the tax was included in the collector's aggregate receipt for said list, transmitted by the assessor to the commissioner of internal revenue.

This was all the evidence. Thereupon the court ordered the jury to return a verdict for the defendant, which was accordingly done. The plaintiff excepted to this ruling of the court. The court entered judgment for the defendant upon the verdict, and to reverse that judgment the plaintiff brought the present writ of error.

The regulations prescribed by the secretary were made by authority of section 3220 of the Revised Statutes. That section provides that "the commissioner of internal revenue, subject to regulations prescribed by the secretary, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected without authority, and all taxes that appear to be unjustly assessed, or excessive in amount, or in any manner wrongfully collected." Section 3228, which the defendant pleaded in bar of the suit, declares "that all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive, or in any manner wrongfully collected, must be presented to the commissioner of internal revenue within two years next after the cause of action accrued."

The suit of the plaintiff was to recover back taxes illegally collected. The defense pleaded was that the claim for the refunding of the tax so illegally collected was not presented to the commissioner of internal revenue within two years after the claim had accrued; that is to say, after the payment of the alleged illegal tax. There was no demurrer to this plea, and it is not disputed that it was good in law. The bill of exceptions recites that the defendant proved that for two years subsequent to the payment of the tax no claim for the refunding of the tax had been made by the plaintiff to the commissioner of internal revenue. Upon this state of the pleadings and proof, the direction of the court to the jury, to return a verdict for the defendant, was right, unless it is held that the facts proven by the plaintiff show a claim made for the refunding of the tax within the meaning of the law. These facts were the indorsement of a protest on the checks by which the taxes were paid, and the making of the prescribed and the amended return, with the protest and claim written thereon as above stated.

As it does not appear by the record that the protest upon the checks was ever brought in any way to the notice of the commissioner, that fact may be eliminated from the case. The contention of the plaintiff in error, therefore, amounts to this: that a protest, upon its return for taxation against the requirements of the form on which the return is made, accompanied by an amended return, made out according to the plaintiff's construction of the law, is such a claim to the commissioner of

internal revenue for the refunding of a tax illegally collected as is required by the law and the regulations of the secretary of the treasury. We think there is no ground for this contention to rest on. No claim for the refunding of taxes can be made according to law and the regulations until after the taxes have been paid. It is not pretended that since the payment of the tax by the plaintiff any one of the steps required by the law and regulations to make an effectual claim for the refunding of the tax has been taken. All the safeguards prescribed by the secretary of the treasury for the protection of the public interests, in his regulations respecting claims for the refunding of taxes, have been disregarded. There has been no claim whatever in the sense of the law.

In our opinion no suit can be maintained for taxes illegally collected, unless a claim therefor has been made within the time prescribed by the law. When the law says the claim must be presented within two years, the implication is that unless so presented the right to demand the repayment of the tax is lost, and the commissioner has no authority to refund it, and, of course, the right of suit is gone. We regard the presentation of the claims to the commissioner of internal revenue for the refunding of a tax alleged to have been illegally exacted as a condition on which alone the government consents to litigate the lawfulness of the original tax. It is clearly not the intent of the statute to allow the collector to be sued unless the tax-payer has first applied for relief to the commissioner within the time and in the manner pointed out by law, and relief has been denied him. *Cheatham v. U. S.*, 92 U. S. 85; *Railroad Co. v. U. S.*, 101 U. S. 543; *Arnson v. Murphy*, 115 U. S. 579; S. C. ante, 185. As the making of such a claim was not alleged or proven, but, on the contrary, the failure to present the claim was pleaded and was established by the testimony, the plaintiff failed to establish its cause of action.

But the plaintiff insists that the judgment of the circuit court should be reversed because the bill of exceptions recites that the plaintiff "proved that the true amount of the tax which should have been assessed against it was the sum of \$428.75, as shown by said amended return," and the defendant having allowed this proof to be made, it is now too late for him to contend that the mere technical preliminaries to establishing this proof were not observed. But the only proof of what the tax should have been, according to the plaintiff's theory, was his amended return; and this raised a question of law which could be presented, but could not be concluded, by the bill of exceptions. Besides, it was shown by the record that the defendant insisted, to the end of the case, and proved, that no claim had been made to the commissioner within two years after its payment for the refunding of the tax sued for. If, therefore, it be conceded that the tax exacted was illegal, the failure to make claim for its repayment is a bar to the suit.

Upon the whole case, therefore, the circuit court was right in directing the verdict for the defendant. Judgment affirmed.



## DE LIMA v. BIDWELL.

Supreme Court of United States, 1900. 182 U. S. 1, 21 S. Ct. 743, 45 L. Ed. 1041.

In Error to the Circuit Court of the United States for the Southern District of New York to review a judgment sustaining a demurrer in an action removed from a state court and brought against the collector of the port of New York to recover back duties on goods imported from Porto Rico.

Mr. Justice BROWN delivered the opinion of the court.

This case raises the single question whether territory acquired by the United States by cession from a foreign power remains a "foreign country" within the meaning of the tariff laws.

1. Did the question of jurisdiction raised by the demurrer involve only the jurisdiction of the Circuit Court as a federal court, we should be obliged to say that the defendant was not in a position to make this claim, since the case was removed to the federal court upon his own petition. It is no infringement upon the ancient maxim of the law that consent cannot confer jurisdiction, to hold that, where a party has procured the removal of a cause from a state court upon the ground that he is lawfully entitled to a trial in a federal court, he is estopped to deny that such removal was lawful if the federal court could take jurisdiction of the case, or that the federal court did not have the same right to pass upon the questions at issue that the state court would have had if the cause had remained there. Defendant neither gains nor loses by the removal, and the case proceeds as if no such removal had taken place. *Cowley v. Northern P. R. Co.*, 159 U. S. 569, 583, 16 Sup. Ct. 127, 40 L. Ed. 263, 267; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672.

This, however, is more a matter of words than of substance, as the defendant unquestionably has the right to show that the state court had no jurisdiction, or that the complaint did not set forth facts sufficient to constitute a cause of action. This we understand to be the substance of the defense in this connection.

By Rev. St. § 2931 (U. S. Comp. St. 1901, p. 1933), it was enacted that the decision of the collector "as to the rate and amount of duties" to be paid upon imported merchandise should be final and conclusive, unless the owner or agent entered a protest and within thirty days appealed therefrom to the Secretary of the Treasury, and, further, that the decision of the Secretary should be final and conclusive, unless suit were brought within ninety days after the decision of the Secretary. By Rev. St. § 3011 (U. S. Comp. St. 1901, p. 1985), any person having made payment under such protest was given the right to bring an action at law and recover back any excess of duties so paid.

The law stood in this condition until June 10, 1890, when an act known as the customs administrative act was passed (Act June 10,

1890, c. 407, 26 Stat. 131 [U. S. Comp. St. 1901, p. 1886]), by which the above sections (Rev. St. §§ 2931, 3011) were repealed and new regulations established, by which an appeal was given from the decision of the collector "as to the rate and amount of duties chargeable upon imported merchandise," if such duties were paid under protest, to a Board of General Appraisers whose decision should be final and conclusive (section 14) "as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification," unless within thirty days one of the parties applied to the Circuit Court of the United States for a review of the questions of law and fact involved in such decision. Section 15. It was further provided that the decision of such court should be final, unless the court were of opinion that the question involved was of such importance as to require a review by this court, which was given power to affirm, modify, or reverse the decision of the Circuit Court.

The effect of the customs administrative act was considered by this court in *Re Fassett*, 142 U. S. 479, 12 Sup. Ct. 295, 35 L. Ed. 1087, in which we held that the decision of the collector that a yacht was an imported article might be reviewed upon a libel for possession filed by the owner, notwithstanding the customs administrative act. It was held that the review of the decision of the Board of General Appraisers, provided for by section 15 of that act, was limited to decisions of the board "as to the construction of the law and the facts respecting the classification" of imported merchandise "and the rate of duty imposed thereon under such classification," and that it did not bring up for review the question whether an article be imported merchandise or not, nor, under section 15, is the ascertainment of that fact such a decision as is provided for.

Said Mr. Justice Blatchford: "Nor can the court of review pass upon any question which the collector had not original authority to determine. The collector had no authority to make any determination regarding any article which is not imported merchandise; and if the vessel in question here is not imported merchandise, the court of review would have no jurisdiction to determine any matter regarding that question, and could not determine the very fact which is in issue under the libel in the District Court on which the rights of the libellant depend. Under the customs administrative act the libellant, in order to have the benefit of proceedings thereunder, must concede that the vessel is imported merchandise, which is the very question put in contention under the libel, and must make entry of her as imported merchandise, with an invoice and a consular certificate to that effect." It was held that the libel was properly filed.

The question involved in this case is not whether the sugars were importable articles under the tariff laws, but whether, coming as they did from a port alleged to be domestic, they were imported from a foreign country; in other words, whether they were imported at all as

that word is defined in *Woodruff v. Parham*, 8 Wall. 123, 132, 19 L. Ed. 382, 384. We think the decision in the *Fassett Case* is conclusive to the effect that, if the question be whether the sugars were imported or not, such question could not be raised before the Board of General Appraisers; and that whether they were imported merchandise for the reasons given in the *Fassett Case* that a vessel is not an importable article, or because the merchandise was not brought from a foreign country, is immaterial. In either case the article is not imported.

Conceding, then, that section 3011 has been repealed, and that no remedy exists under the customs administrative act, does it follow that no action whatever will lie? If there be an admitted wrong, the courts will look far to supply an adequate remedy. If an action lay at common law, the repeal of sections 2931 and 3011, regulating proceedings in customs cases (that is, turning upon the classification of merchandise), to make way for another proceeding before the Board of General Appraisers in the same class of cases, did not destroy any right of action that might have existed as to other than customs cases; and the fact that by section 25 no collector shall be liable "for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges, or duties on or on account of said merchandise," or any other matter which the importer might have brought before the Board of General Appraisers, does not restrict the right which the owner of the merchandise might have against the collector in cases not falling within the customs administrative act. If the position of the government be correct, the plaintiff would be remediless; and if a collector should seize and hold for duties goods brought from New Orleans, or any other concededly domestic port, to New York, there would be no method of testing his right to make such seizure. It is hardly possible that the owner could be placed in this position. But we are not without authority upon this point.

The case of *Elliott v. Swartwout*, 10 Pet. 137, 9 L. Ed. 373, was an action of assumpsit against the collector of the port of New York to recover certain duties upon goods alleged to have been improperly classified. It was held that as the payment was purely voluntary, by a mutual mistake of law, no action would lie to recover them back, although it would have been different if they had been paid under protest. Said Mr. Justice Thompson: "Here, then, is the true distinction: when the money is paid voluntarily and by mistake to an agent, and he has paid it over to his principal, he cannot be made personally responsible; but if, before paying it over, he is apprised of the mistake, and required not to pay it over, he is personally liable." If the payment of the money be accompanied by a notice to the collector that the duties charged are too high and that the person paying intends to sue to recover back the amount erroneously paid, it was held that such action must lie "unless the broad



proposition can be maintained, that no action will lie against a collector to recover back an excess of duties paid him, but that recourse must be had to the government for redress." The case recognized the fact that, with respect to money paid under a mistake of law, the collector stood in the position of an ordinary agent, and could be made personally liable in case the money were paid under protest.

This decision was made in 1836. Apparently in consequence of it an act was passed in 1839 requiring moneys collected for duties to be deposited to the credit of the Treasurer of the United States; and it was made the duty of the Secretary of the Treasury to draw his warrant upon the Treasurer in case he found more money had been paid to the collector than the law required. It was held by a majority of this court in *Cary v. Curtis*, 3 How. 236, 11 L. Ed. 576, that this act precluded an action of assumpsit for money had and received against the collector for duties received by him, and that the act of 1839 furnished the sole remedy. It was said of that case in *Arnson v. Murphy*, 109 U. S. 238, 240, 3 Sup. Ct. 184, 186, 27 L. Ed. 920, 921: "Congress, being in session at the time that decision was announced, passed the explanatory act of February 26, 1845, which, by legislative construction of the act of 1839, restored to the claimant his right of action against the collector, but required the protest to be made in writing at the time of payment of the duties alleged to have been illegally exacted, and took from the Secretary of the Treasury the authority to refund conferred by the act of 1839 (5 Stat. 349, 727, c. 22). This act of 1845 was in force, as was decided in *Barney v. Watson*, 92 U. S. 449, 23 L. Ed. 730, until repealed by implication by the act of June 30, 1864" (13 Stat. 214, c. 171, § 14), carried into the Revised Statutes as §§ 2931 and 3011.

In the same case of *Arnson v. Murphy*, 109 U. S. 238, 3 Sup. Ct. 184, 27 L. Ed. 920, it was decided that the common-law right of action against the collector to recover back duties illegally collected was taken away by statute, and a remedy given, based upon these sections, which was exclusive. The decision in *Elliott v. Swartwout* was recognized, but so far as respected customs cases (i. e., classification cases) was held to be superseded by the statutes. So in *Schoenfeld v. Hendricks*, 152 U. S. 691, 14 Sup. Ct. 754, 38 L. Ed. 601, it was held that an action could not be maintained against the collector, either at common law or under the statutes, to recover duties alleged to have been exacted, in 1892, upon an importation of merchandise, the remedy given through the Board of General Appraisers being exclusive.

The criticism to be made upon the applicability of these cases is that they dealt only with imported merchandise and with the duties collected thereon, and have no reference whatever to exactions made by a collector, under color of the revenue laws, upon goods which have never been imported at all. With respect to these the collector stands as if, under color of his office, he had seized a ship or its equipment, or any other article not comprehended within the scope of the tariff

laws. Had the sugars involved in this case been admittedly imported, that is, brought into New York from a confessedly foreign country, and the question had arisen whether they were dutiable, or belonged to the free list, the case would have fallen within the customs administrative act, since it would have turned upon a question of classification.

The fact that the collector may have deposited the money in the treasury is no bar to a judgment against him, since Rev. St. § 989 (U. S. Comp. St. 1901, p. 708), provides that, in case of a recovery of any money exacted by him and paid into the treasury, if the court certifies that there was probable cause for the act done, no execution shall issue against him, but the amount of the judgment shall be paid out of the proper appropriation from the treasury.

We are not impressed by the argument that, if the plaintiffs insisted that these sugars were not imported merchandise, they should have stood upon their rights, refused to enter the goods, and brought an action of replevin to recover their possession. It is true that, to prevent the seizure of the sugars, plaintiffs did enter them as imported merchandise; but any admission derivable from that fact is explained by their protest against the exaction of duties upon them as such. They waived nothing by taking this course. The collector lost nothing, since he was apprised of the course they would probably take. It is true that in the *Fassett Case*, 142 U. S. 479, 12 Sup. Ct. 295, 35 L. Ed. 1087, the proceeding was by libel for possession of the vessel which is analogous to an action of replevin at common law; but it would appear that Rev. St. § 934 (U. S. Comp. St. 1901, p. 689), would stand in the way of such a remedy here, since by that section "all property taken or detained by any officer or other person under authority of any revenue law of the United States shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." If the words "under authority of any revenue law" are to be construed as if they read "under color of any revenue law," it would seem that these sugars could not be made the subject of a replevin; but even conceding that replevin would lie, we consider it merely a choice of remedies, and that the plaintiffs were at liberty to waive the tort and proceed in assumpsit.

We are all of opinion that this action was properly brought. \* \* \*

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#### TEAL v. FELTON.

Supreme Court of United States, 1851. 12 How. 284, 13 L. Ed. 990.

Mr. Justice WAYNE delivered the opinion of the court.

This suit was brought in a justice's court to recover from the plaintiff in error the value of a newspaper, received by him as postmaster at Syracuse, which he refused to deliver to the defendant in error to whom it was addressed. The plaintiff in error had charged

the newspaper with letter postage, on account of a letter or initial upon the wrapper of it, distinct from the direction. This the defendant refused to pay, at the same time tendering the lawful postage of a newspaper. The postmaster would not receive it, and retained the paper against the will of the defendant. Upon that demand and refusal the suit was brought. The action was trover and the general issue was pleaded. In the course of the trial, when the defendant in error, who was plaintiff in the suit below, was introducing testimony in support of his case, the defendant objected to a further examination of the case by witnesses, upon the ground that the court had not jurisdiction of the case. The objection having been overruled, the trial of the case was continued; and after the plaintiff had proved that he demanded from the defendant the newspaper, tendering the lawful postage, and that the postmaster refused to deliver it to him, he rested his case. \* \* \*

From the evidence in this case, we do not think that the initial or letter upon the wrapper of the newspaper in this case, subjected it, either under the thirteenth or thirtieth section of the act of 1825, to letter postage. \* \* \* This was not a case in which judgment could be used to determine any fact, except by some other evidence than the letter itself. Nor was it one calling for discretion in the legal acceptance of that term in respect to officers who are called upon to discharge public duties. What was done by the postmaster was a mere act of his own, and ministerial, as that is understood to be, distinct from judicial. It could not have been the intention of Congress to put it in the power of postmasters, upon a mere suspicion raised by a single letter or initial, to arrest the transmission of newspapers from the presses issuing them, or when they were mailed by private hands.

This view of the law disposes also of that point in the argument, claiming for the postmaster an exemption from the suit of the plaintiff, upon the ground that he was called upon, in the act which he did, to exercise discretion and judgment. In *Kendall v. Stokes*, 3 How. 97, 98, 11 L. Ed. 506, will be found this court's exposition upon that subject, with the leading authorities in support of it. The difference between the two must at all times be determined by the law under which an officer is called upon to act, and by the character of the act. It is the law which gives the justification, and nothing less than the law can give irresponsibility to the officer, although he may be acting in good faith under the instructions of his superior of the department to which he belongs. Here the instructions exceed the law, and marks and signs of themselves, without some knowledge of their meaning, and the intention in the use of them, are, as we have said, neither memoranda nor writings. *Tracy v. Swartwout*, 10 Pet. 80, 9 L. Ed. 354.

But it is said that the courts of New York had not jurisdiction to try the case. The objection may be better answered by reference to



the laws of the United States, in respect to the service to be rendered in the transmission of letters and newspapers by mail, and by the Constitution of the United States, than it can by any general reasoning upon the concurrent civil jurisdiction of the courts of the United States and the courts of the states, or concerning the exclusive jurisdiction given by the Constitution to the former.

The United States undertakes, at fixed rates of postage, to convey letters and newspapers for those to whom they are directed, and the postage may be prepaid by the sender, or be paid when either reach their destination, by the person to whom they are addressed. When tendered by the latter or by his agent, he has the right to the immediate possession of them, though he has not had before the actual possession. If then they be wrongfully withheld for a charge of unlawful postage, it is a conversion for which suit may be brought. His right to sue existing, he may sue in any court having civil jurisdiction of such a case, unless for some cause the suit brought is an exception to the general jurisdiction of the court.

Now the courts in New York having jurisdiction in *trover*, the case in hand can only be excepted from it by such a case as this having been made one of exclusive jurisdiction in the courts of the United States, by the Constitution of the United States. That such is not the case, we cannot express our view better than Mr. Justice Wright has done in his opinion in this case in the Court of Appeals. After citing the second section of the third article of the Constitution, he adds: "This is a mere grant of jurisdiction to the federal courts, and limits the extent of their power, but without words of exclusion or any attempt to oust the state courts of concurrent jurisdiction in any of the specified cases in which concurrent jurisdiction existed prior to the adoption of the Constitution. The apparent object was not to curtail the powers of the state courts, but to define the limits of those granted to the federal judiciary."<sup>4</sup> We

<sup>4</sup> See *Teall v. Felton*, 1 N. Y. 537, 546, 49 Am. Dec. 352 (1848): "But the counsel for the plaintiff in error contends that this is a case which the state courts did not hold cognizance of at the adoption of the federal Constitution, for the reason that the Post-Office Department not only never in any manner or at any time pertained to the state or colony, but is entirely the creation of the national statute; that it owes its existence exclusively to the Constitution and national legislature; and hence that the federal judiciary has exclusive jurisdiction in all matters growing out of or pertaining to it. That the post office is a federal institution no one will deny; but it is difficult to perceive how the premises of the counsel sustain the conclusion at which he arrives. The same reason would apply with equal force in case of a suit being brought against a collector of the customs. The present action is one coeval with the common law, to enforce a right to property, alleged to have been wrongfully converted by the defendant. This remedy for a tortious conversion has always been complete in the state courts. It does not follow that, because the defendant may have been acting under a law of Congress in withholding the newspaper, and consequently may defend himself against the alleged conversion, that jurisdiction of the subject-matter is exclusively given or acquired by the federal courts under such law. The plaintiff is not seeking redress under the post-office laws, or attempting to enforce a penalty specifically imposed by them on the postmaster for a fraudulent act pertaining to his official

will add that the legislation of Congress, immediately after the Constitution was carried into operation, confirms the conclusion of the learned judge. We find, in the twenty-fifth section of the judiciary act of 1789, under which this case is before us, that such a concurrent jurisdiction in the courts of the states and of the United States was contemplated, for its first provision is for a review of cases adjudicated in the former, "where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity."

We are satisfied that there was no error in the decision of the Court of Appeals in this case, and the same is affirmed by this court.

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SMIETANKA, Collector of Internal Revenue, v. INDIANA STEEL CO.

Supreme Court of the United States, 1921. 257 U. S. 1, 42 S. Ct. 1, 66 L. Ed. 99.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit brought to recover internal revenue special excise taxes for the years 1910 and 1912, assessed under the Act of Congress of August 5, 1909, c. 6, § 38, 36 Stat. 11, 112, and paid by the plaintiff, the defendant in error under duress. The taxes were collected by S. M. Fitch, then collector of internal revenue, and it was certified by the District Court as part of its judgment that there was probable cause for the act of the collector, that he acted under the direction of the Commissioner of Internal Revenue, and that the amounts recovered should be provided for and paid out of the proper appropriation from the Treasury of the United States. The defendant is the present collector for what was Fitch's district and was held liable by this judgment. The case was taken to the Circuit Court of Appeals which has certified the following questions:

"1. Assuming that the declaration states a good cause of action had the suit been brought against S. M. Fitch, the internal revenue collector who actually collected and received the taxes, does it state any cause of action whatever against said S. M. Fitch's successor in office, the plaintiff in error, against whom the suit was brought, but who had no participation in the collection, receipt or disbursement of such taxes?

duty. She simply seeks to recover in an appropriate common-law tribunal, competent to afford a remedy, and in a form of action more ancient than the federal Constitution or laws, the value of her property. If the defendant can maintain that by the post-office laws, or any constitutional act of the national legislature, there was no legal conversion, his defense will be complete. But it is an incorrect conclusion that because a law of Congress prescribes the duties of an officer of the federal government, and in a proper case he may thereunder defend his acts, for such reason the state courts are ousted of jurisdiction. Upon the whole, I have no doubt that the justice had jurisdiction in the present case; and, whilst asserting this jurisdiction, I would not be understood as inclined to throw the least obstacle in the way of a successful operation of the general government, or to encourage the exercise of state power having that tendency."

"2. May suit in the District Court of the United States properly be brought and maintained against a United States collector of internal revenue for the recovery of the amount of a United States internal revenue tax, unlawfully assessed and collected, but in the collection and disbursement of which such collector had no agency, the entire transaction of such assessment, collection and disbursement having occurred during the incumbency of such office of a predecessor in office of such collector?"

As the law stood before later statutes a collector was liable personally for duties mistakenly collected, if the person charged gave notice, at the time, of his intention to sue, and warning not to pay over the amount to the Treasury. *Elliott v. Swartwout*, 10 Pet. 137, 9 L. Ed. 373. But after an Act of Congress had required collectors to pay over such moneys, it was held, against the dissent of Mr. Justice Story, that the personal liability was gone. *Cary v. Curtis*, 3 How. 236, 11 L. Ed. 576. Later statutes however recognize suits against collectors in such cases, and the plaintiff contends that they should be construed to create a new statutory liability attached to the office and passing to successors, as was held in this case, the formal defendant being saved from harm by the United States. This however is not the language of the statutes and hardly can be reconciled with the decision of this Court in *Sage v. United States*, 250 U. S. 33, 39 S. Ct. 415, 63 L. Ed. 828, and other cases to which we shall refer.

To show that the action still is personal, as laid down in *Sage v. United States*, 250 U. S. 33, 39 S. Ct. 415, 63 L. Ed. 828, it would seem to be enough to observe that when the suit is begun it cannot be known with certainty that the judgment will be paid out of the Treasury. That depends upon the certificate of the Court in the case. It is not to be supposed that a stranger to an unwarranted transaction is made answerable for it; yet that might be the result of the suit if it could be brought against a successor to the collectorship.

A personal execution is denied only when the certificate is given. It is true that in this instance the certificate has been made, but the intended scope of the action must be judged by its possibilities under the statutes that deal with it. The language of the most material enactment, Rev. St. § 989 (Comp. St. § 1635), gives no countenance to the plaintiff's argument. It enacts that no execution shall issue against the collector but that the amount of the judgment shall "be provided for and paid out of the proper appropriation from the Treasury," when and only when the Court certifies to either of the facts certified here, and "when a recovery is had in any suit or proceedings against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty." A recovery for acts done by the defendant is the only one contemplated by the words "by him." The same is true of Rev. St. § 771 (Comp. St. § 1296), requiring District Attorneys to defend such suits.



No different conclusion results from the Act of February 8, 1899, c. 121, 30 Stat. 822 (Comp. St. § 1594). That is a general provision that a suit by or "against an officer of the United States in his official capacity" should not abate by reason of his death, or the expiration of his term of office, etc., but that the Court upon motion within twelve months showing the necessity for the survival of the suit to obtain a settlement of the question involved, may allow the same to be maintained by or against his successor in office. Whether this would apply to a suit of the present kind is at least doubtful. *Roberts v. Lowe* (D. C.) 236 F. 604, 605. In *Patton v. Brady*, 184 U. S. 608, 22 S. Ct. 493, 46 L. Ed. 713, a suit against a collector begun after the passage of this statute, it was held that it could be revived against his executrix, which shows again that the action is personal; as also does the fact that the collector may be held liable for interest. *Erskine v. Van Arsdale*, 15 Wall. 75, 21 L. Ed. 63. *Redfield v. Bartels*, 139 U. S. 694, 11 S. Ct. 683, 35 L. Ed. 310. But in any event the statute supposes a suit already begun against the officer in his lifetime. We need not consider the remedies against the United States. *United States v. Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, 35 S. Ct. 499, 59 L. Ed. 825; *Sage v. United States*, 250 U. S. 33, 39 S. Ct. 415, 63 L. Ed. 828.\* It appears to us plain without further discussion that both questions must be answered: No.

Answer to Questions 1 and 2: No.

Mr. Justice McKENNA and Mr. Justice CLARKE dissent.

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REVENUE ACT 1926, § 1122(c), 28 USCA § 41(20): "The paragraph added by section 1310 of the Revenue Act of 1921 at the end of paragraph twentieth of section 24 of the Judicial Code, relating to the jurisdiction of District Courts, as amended, is re-enacted without change, as follows:

"Concurrent with the Court of Claims, of any suit or proceeding, commenced after the passage of the Revenue Act of 1921, for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected, under the internal revenue laws, even if the claim exceeds \$10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced."

\* See, also, *Dooley v. United States*, 182 U. S. 222, 21 S. Ct. 762, 45 L. Ed. 1074 (1901), p. 426, *supra*.

## SECTION 54.—MANDAMUS IN THE COURTS OF THE UNITED STATES

KENDALL v. UNITED STATES *ex rel.* STOKES.

Supreme Court of United States, 1838. 12 Pet. 524, 9 L. Ed. 1181.

THOMPSON, J.<sup>5</sup> \* \* \* The next inquiry is, whether the court below<sup>6</sup> had jurisdiction of the case, and power to issue the mandamus? This objection rests upon the decision of this court, in the cases of *McIntire v. Wood*, 7 Cranch, 504, 3 L. Ed. 420, and *McClung v. Silliman*, 6 Wheat. 598, 5 L. Ed. 340. It is admitted that those cases have decided that the Circuit Courts of the United States, in the several states, have not authority to issue a mandamus against an officer of the United States. \* \* \*

The result of these cases, then, clearly is that the authority to issue the writ of mandamus to an officer of the United States, commanding him to perform a specific act required by a law of the United States, is within the scope of the judicial powers of the United States under the Constitution, but that the whole of that power has not been communicated by law to the Circuit Courts, or, in other words, that it was then a dormant power, not yet called into action, and vested in those courts, and that there is nothing growing out of the official character of the party that will exempt him from this writ, if the act to be performed is purely ministerial.

It must be admitted, under the doctrine of this court in the cases referred to, that unless the circuit court of this District is vested with broader powers and jurisdiction in this respect than is vested in the Circuit Courts of the United States in the several states, then the mandamus in the present case was issued without authority. But in considering this question it must be borne in mind that the only ground on which the court placed its decision was that the constitutional judicial powers on this subject had not been imparted to those courts. \* \* \*

But let us examine the act of Congress of the 27th of February, 1801, concerning the District of Columbia, and by which the circuit court is organized, and its powers and jurisdiction pointed out. And it is proper, preliminarily, to remark that under the Constitution of the United States, and the cessions made by the states of Virginia and Maryland, the exercise of exclusive legislation, in all cases whatsoever, is given to Congress. And it is a sound principle that, in

<sup>5</sup> For first part of opinion, see ante, p. 456.

<sup>6</sup> The circuit court of the District of Columbia.

every well-organized government, the judicial power should be co-extensive with the legislative, so far, at least, as private rights are to be enforced by judicial proceedings. There is, in this District, no division of powers between the general and state governments. Congress has the entire control over the District, for every purpose of government; and it is reasonable to suppose that, in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice. The circuit court here is the highest court of original jurisdiction; and if the power to issue a mandamus in a case like the present exists in any court, it is vested in that court.

Keeping this consideration in view, let us look at the act of Congress. The first section declares that the laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the District which was ceded by that state to the United States, which is the part lying on this side the Potomac, where the court was sitting when the mandamus was issued. It was admitted on the argument that at the date of this act the common law of England was in force in Maryland, and, of course, it remained and continued in force in this part of the District; and that the power to issue a mandamus in a proper case is a branch of the common law cannot be doubted, and has been fully recognized as in practical operation in that state, in the case of *Runkel v. Winemiller*, 4 Har. & McH. 448, 1 Am. Dec. 411. \* \* \*

There can be no doubt but that, in the state of Maryland, a writ of mandamus might be issued to an executive officer, commanding him to perform a ministerial act required of him by law; and if it would lie in that state, there can be no good reason why it should not lie in this district, in analogous cases. \* \* \*

Thus far the power of the circuit court to issue the writ of mandamus has been considered as derived under the first section of the act of 27th February, 1801. But the third and fifth sections are to be taken into consideration in deciding this question. The third section, so far as it relates to the present inquiry, declares "that there shall be a court in this district, which shall be called the circuit court of the District of Columbia; and the said court, and the judges thereof, shall have all the powers by law vested in the Circuit Courts and the judges of the Circuit Courts of the United States." And the fifth section declares "that the said court shall have cognizance of all cases, in law and equity, between parties, both or either of which shall be resident or be found within the District." \* \* \* This, of course, means cases of judicial cognizance. That proceedings on an application to a court of justice for a mandamus are judicial proceedings cannot admit of a doubt; and that this is a case in law is equally clear. It is the prosecution of a suit to enforce a right secured by a special act of Congress, requiring of the Postmaster General the performance of a precise, def-



inite and specific act, plainly enjoined by the law. It cannot be denied but that Congress had the power to command that act to be done; and the power to enforce the performance of the act must rest somewhere, or it will present a case, which has often been said to involve a monstrous absurdity in a well-organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist. And if the remedy cannot be applied by the circuit court of this District, it exists nowhere. But by the express terms of this act the jurisdiction of this circuit court extends to all cases in law, etc. No more general language could have been used. An attempt at specification would have weakened the force and extent of the general words—all cases. Here, then, is the delegation to this circuit court of the whole judicial power in this District, and in the very language of the Constitution, which declares that the judicial power shall extend to all cases in law and equity, arising under the laws of the United States, etc., and supplies what was said by this court in the cases of *McIntire v. Wood* and *McClung v. Silliman*, to be wanting, viz.: That the whole judicial power had not been delegated to the Circuit Courts in the states, and which is expressed in the strong language of the court, that the idea never presented itself to any one that it was not within the scope of the judicial powers of the United States, although not vested by law in the courts of the general government. \* \* \*

The judgment of the court below is accordingly affirmed.

CATRON, Justice (dissenting). \* \* \* On the merits, I think the Senate of the United States, and the Solicitor of the Treasury, construed the special act of Congress correctly, and that the Solicitor's award is a final adjudication, and conclusive of the rights of the relators.

But the question whether the circuit court of this District had power to compel the Postmaster General, by mandamus, to enter a credit for the amount awarded, lies at the foundation of our institutions. A question more grave or important rarely arises. Coercion, by the writ of mandamus, of the officers and agents of a government, is one of the highest exertions of sovereignty known to the British constitution and common law. It is truly declared to be one of the flowers of the King's Bench (3 Bl. Com. 110, note), and in England can only be enforced by that court, where the king formerly sat in person, and is now deemed to be potentially present. It is his command, in his own name, directed to a court, person or corporation, to do a particular thing therein specified, which appertains to their office or duty, as a means of compelling its performance. 3 Bl. Com. c. 7. The proceeding there, as here, is in the name of the government, and not that of the relators; it stands on the foot of contempt, and is intended to reform official delinquency.

By the act of independence, this prerogative and portion of sovereignty, unimpaired, devolved on the different states of this Union;

and by the Constitution of the United States, such portion of it as was necessary to coerce the courts, officers and agents of the general government was withdrawn from the states, and conferred on the federal sovereignty. Here the power lay dormant, until Congress should act. On the Legislature was imposed the duty to give it effect; it was wide as the land, and extended to every portion of it; and by the judiciary act of 1789 (section 13) Congress attempted to invest the Supreme Court of the United States with the power to issue writs of mandamus to persons holding office under the authority of the United States. But the Constitution having restricted this court to the exercise of certain original powers, and this not being amongst them, it was holden, in *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60, so much of the act was void. The decision was made in 1803; up to that time, Congress and the country did not question that a law existed, proper and necessary to give effect to the prerogative, through the instrumentality of this court, and that it was properly vested in the highest tribunal in the land, exercising a jurisdiction coextensive with our whole territory. So the matter stood, when the act of the 27th February, 1801, was passed, organizing the circuit court for the District of Columbia. And the question is, did Congress, by implication, confer, or intend to confer, this high prerogative, within the ten miles square, on the circuit court? That concurrent power with the Supreme Court was intended to be given it is difficult to believe. \* \* \*

It is admitted, and was so decided in *McIntire v. Wood*, that none other of the Circuit Courts of the United States, holden by the judges of the Supreme Court, have the power claimed for the court in this District, and that throughout the twenty-six states of the Union this high prerogative writ cannot be exerted, because Congress, since the decision in 1803, in the case of *Marbury v. Madison*, has not seen proper to vest it in these inferior tribunals; nor is it matter of surprise, when we recollect to what extent the executive departments would have been subjected to the judicial power.

Should we, then, by doubtful implication and a strained construction, apply this highest of judicial powers, in its nature broad as the Union, to this ten miles square? That the power can only be maintained to exist by implication, and not by express enactment, is admitted on all hands. It never was attempted to be conferred, in express terms, save on the Supreme Court; and is the construction that invokes it for the circuit court of this District a strained one? The tenth section of the repealed act of the 13th of February, 1801, declares "that the circuit courts then established shall have, and are hereby invested with, all the powers heretofore granted by law to the Circuit Courts of the United States, unless otherwise provided by this act." There is no repealing clause to the act. The section quoted refers directly to the fourteenth section of the act of 1789, for the powers common to all the Circuit Courts of the Union. They

have stood unaltered, and been recognized, with slight exceptions, as the sole powers by which the jurisdiction of the Circuit Courts has been enforced, from the year 1789 to this time. •

It is insisted, however, that the jurisdiction conferred on the circuit court by the eleventh section of the repealed act of the 13th of February, 1801, is much broader than that given to them by the eleventh section of the act of 1789; that the act of 1801 covers the whole ground of the Constitution. This is certainly true; but the fifth section of the act of the 27th of February, 1801, declaring what matters shall be cognizable in the circuit court for the District of Columbia, confers jurisdiction quite as comprehensive. Its cognizance (or jurisdiction "to hold plea") extends to all crimes and offenses, and to all cases in law and equity, provided the defendant be found in the district. Thus, as the eleventh sections of the act of 1789 and the 13th of February, 1801, each have reference to the exercise of jurisdiction, in suits or actions between litigant parties, or over matters in some form brought before the court to try and ascertain a contested right, it would be a most unnatural construction to hold (as I think) that the phrase "cognizance of all cases in law and equity" authorized the court to assume the high power of coercing by mandamus one of the Secretaries, or the Postmaster General, to the performance of some specific public duty, in case of an ascertained right, by force of the strong arm of sovereign power, because he was a public officer; and who was not a suitor in court, or party to a case in law or equity. \* \* \*

The truth, there can be little room for doubt, is that Congress has been unwilling to expose the action of the government, in the administration of its vast and complicated affairs, and its officers, who have charge of their management, to the danger and indignity of being coerced and controlled, at the ill-defined discretion of the inferior courts, by the writ of mandamus, and that after the decision of *Marbury v. Madison*, in 1803, holding that the Supreme Court had not the power thus to coerce an officer of the United States, it has been permitted to lie dormant, awaiting the action of the Legislature. The supposition is rendered highly probable, when we consider the delicacy its exercise would necessarily involve, and the difficulty of vesting so high and extensive a power in the inferior courts, and especially, in those of this District, in a modified and safe form.

Such being my own opinion, I think the order awarding the mandamus against the Postmaster General should be reversed, for want of jurisdiction in the court below to issue the writ.

Judgment affirmed.<sup>7</sup>

<sup>7</sup> It was held in *United States v. Schurz*, 102 U. S. 378, 393, 394, 26 L. Ed. 167 (1880), that the revision of the statutes of the United States did not affect the jurisdiction of the Supreme Court of the District of Columbia to issue writs of mandamus.

## BATH COUNTY v. AMY.

Supreme Court of United States, 1871. 13 Wall. 244, 20 L. Ed. 539.

Error to the Circuit Court for the District of Kentucky; the case being thus:

The eleventh section of the judiciary act of 1789, enacts that "the Circuit Court shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law, \* \* \* between a citizen of the state where the suit was brought and a citizen of another state."

The fourteenth section of the same act, referring to certain courts of the United States, including the Circuit Courts, enacts: "That all the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." \* \* \*

With those statutes in force, the Legislature of Kentucky incorporated, A. D. 1852, the Lexington & Big Sandy Railroad Company. By the charter of the railroad the county courts of the different counties, through which it was to run, were authorized to subscribe to the stock of the road, and to pay their subscriptions by borrowing money, making the money borrowed payable in the way in which the county courts should deem most advisable. The interest on all such sums borrowed was to be provided for in like manner, provided that all taxes laid to pay either principal or interest should be sacredly appropriated to such purpose and no other. A subsequent act required the county courts to issue bonds, and to proceed to levy, assess, and collect a tax to pay the interest thereon, according to the true intent and meaning of the previous act.

The county of Bath subscribed \$150,000, and issued one hundred and fifty bonds of \$1,000 each, payable thirty years from date, with interest semiannually, for which coupons were annexed. And the company, having indorsed them, sold and put them into circulation. The county court levied the tax and paid the interest for five years, and then stopped payment.

In this state of things one Amy, of New York, being the holder of eighty-two of the bonds, with the overdue and unpaid coupons, in November, 1866, made a written demand upon the justices, who composed the county court of Bath county, requiring the court forthwith to levy the necessary tax to pay his coupons, and notified to each of the judges that, if they did not do so, he would on the second day of the next term of the Circuit Court of the United States, sitting in the district, move that court for the writ of mandamus requiring them to do it. No tax was levied; and at the next term of the Circuit Court, Amy accordingly filed an affidavit in the nature of an information,



setting forth specifically his case, and concluding with a prayer for a mandamus requiring the tax to be levied. The court granted a rule against the county to show cause why the writ should not issue. The county came and craved oyer of the bonds and coupons, which was had, upon which it moved the court to discharge the rule, and also filed a response to the rule setting forth eleven points of defense.

By agreement of counsel a general traverse of the facts set out in the response was entered on the record, and the law and facts submitted to the court for trial and decision. Upon the trial, the court found the issues for the plaintiff, and gave judgment awarding a peremptory writ of mandamus. To reverse this judgment the county brought the case here; the chief ground of the argument of their counsel, Messrs. M. Blair, J. G. Carlisle, and J. B. Beck, being that under the fourteenth section of the act of September 24, 1789, the Circuit Court of the United States had no jurisdiction to issue a writ of mandamus, there having been no previous judgment of the court in favor of the party holding the obligations, and no previous attempt made by it to enforce their payment by its ordinary process.

Mr. Justice STRONG delivered the opinion of the court.

It must be considered as settled that the Circuit Courts of the United States are not authorized to issue writs of mandamus, unless they are necessary to the exercise of their respective jurisdictions. Those courts are creatures of statute, and they have only so much of the judicial power of the United States as the acts of Congress have conferred upon them. The judiciary act of 1789, which established them, by its eleventh section, enacted that they shall have original cognizance, concurrently with the courts of the several states, of "all suits of a civil nature at common law, or in equity," between a citizen of the state in which the suit is brought and a citizen of another state, or where an alien is a party. While it may be admitted that, in some senses, the writ of mandamus may properly be denominated a suit at law, it is still material to inquire whether it was intended to be embraced in the gift of power to hear and determine all suits at common law, of a civil nature, conferred by the judiciary act.

At the time when the act was passed it was a high prerogative writ, issuing in the king's name only from the Court of King's Bench, requiring the performance of some act or duty, the execution of which the court had previously determined to be consonant with right and justice. It was not, like ordinary proceedings at law, a writ of right, and the court had no jurisdiction to grant it in any case except those in which it was the legal judge of the duty required to be performed. Nor was it applicable, as a private remedy, to enforce simple common-law rights between individuals. Were there nothing more, then, in the judiciary act than the grant of general authority to take cognizance of all suits of a civil nature at common law, it might well be doubted whether it was intended to confer the extraordinary

powers residing in the British Court of King's Bench to award prerogative writs.

All doubts upon this subject, however, are set at rest by the fourteenth section of the same act, which enacted that Circuit Courts shall have "power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute which may be necessary to the exercise of their respective jurisdictions and agreeable to the principles and usages of law." Among those other writs, no doubt, mandamus is included; and this special provision indicates that the power to grant such writs generally was not understood to be granted by the eleventh section, which conferred, only to a limited extent, upon the Circuit Courts the judicial power existing in the government under the Constitution. Power to issue such writs is granted by the fourteenth section, but with the restriction that they shall be necessary to the exercise of the jurisdiction given. Why make this grant if it had been previously made in the eleventh section? The limitation only was needed.

This subject has heretofore been under consideration in this court, and in *McIntire v. Wood*, 7 Cranch, 504, 3 L. Ed. 420, it was unanimously decided that the power of the Circuit Courts to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. The court said: "Had the eleventh section of the judiciary act covered the whole ground of the Constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right arising under laws of the United States, and the fourteenth section of the act would sanction the issuing of the writ for such a purpose. But, although the judicial power of the United States extends to cases arising under the laws of the United States, the Legislature have not thought proper to delegate the exercise of that power to its Circuit Courts, except in certain specified cases." And in *McClung v. Silliman*, 6 Wheat. 601, 5 L. Ed. 340, this court said, when speaking of the power to issue writs of mandamus: "The fourteenth section of the act under consideration [the judiciary act] could only have been intended to vest the power \* \* \* in cases where the jurisdiction already exists, and not where it is to be courted or acquired by means of the writ proposed to be sued out." In other words, the writ cannot be used to confer a jurisdiction which the Circuit Court would not have without it. It is authorized only when ancillary to a jurisdiction already acquired. The doctrine asserted in both these cases was conceded to be correct by both the majority and the minority of the court in *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181. The power to issue a writ of mandamus as an original and independent proceeding does not, then, belong to the Circuit Courts. \* \* \*

Applying this rule to the present case, it is decisive. The relator's

claim for payment had not been brought to judgment in the Circuit Court, nor had it been put in suit. His application for a mandamus was, therefore, an original proceeding, neither necessary nor ancillary to any jurisdiction which the court then had. For this reason it should have been denied, and the judgment that a peremptory mandamus should issue was erroneous.

Judgment reversed, and the cause remanded with instructions to dismiss the petition for a mandamus.<sup>8</sup>

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UNITED STATES *ex rel.* SEEGER *v.* PEARSON, Postmaster.

Circuit Court of United States, S. D. New York, 1887. 32 Fed. 309.

*Mandamus.*

The relator alleges that he is the editor and proprietor of a newspaper periodical called "Medical Classics," and has requested the defendant, who is the postmaster of New York, to enter and transmit through the mails this publication as second-class matter. This request was refused by the defendant, and the publication was charged a higher rate of postage, as third-class matter, because held to be designed as an advertising medium. The relator denies any such purpose. On appeal by the relator to the First Assistant Postmaster General, this refusal was sustained; and the relator brings this proceeding to compel the defendant, by mandamus, to receive and transmit the publication as second-class matter.

BROWN, J. I am constrained, by the weight of authority, to decline to entertain this proceeding by mandamus. A long line of decisions of the Supreme Court has affirmed the broad doctrine that the Circuit Court has no jurisdiction to issue a writ of mandamus as an original proceeding, but only as ancillary to some other proceedings or right of which it has jurisdiction.

Considering that the fourth subdivision of section 629 of the Revised Statutes (U. S. Comp. St. 1901, p. 503) gives the Circuit Court express jurisdiction "of all causes arising under the postal laws" (Act March 3, 1845, 5 Stat. 739), and that the fourteenth section of the judiciary act (section 716, Rev. St. [page 580, U. S. Comp. St.]) authorizes the federal courts to issue such writs whenever "necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law," it might have been inferred, in the absence of authority, that if the relator was entitled to the relief demanded, according to the general usage and practice

<sup>8</sup> So *Rosenbaum v. Bauer*, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743 (1887).

As to power of federal courts to issue mandamus to municipal corporations to levy taxes required for the payment of judgments, as an ancillary jurisdiction to the enforcement of judgments recovered in those courts, see *Riggs v. Johnson Co.*, 6 Wall. 166, 18 L. Ed. 768 (1867).

of the law, and if a writ of mandamus was the proper remedy for such relief, the writ might have been issued in the exercise of the proper jurisdiction of the court, inasmuch as the cause is one arising exclusively "under the postal laws."

Upon repeated examination of the decisions of the Supreme Court, however, I cannot find myself authorized to treat this question as an open one. In most of the cases in which the question has arisen, the Circuit Court had undoubted original jurisdiction of the subject-matter of the proceedings, under some one or other of the express provisions of the statutes, quite as clear as is its authority to determine "all causes arising under the postal laws." Nevertheless, the right to pursue the remedy by means of an original writ of mandamus has been uniformly denied. *McIntire v. Wood*, 7 Cranch, 504, 3 L. Ed. 420; *McClung v. Silliman*, 6 Wheat. 598, 5 L. Ed. 340; *Bath Co. v. Amy*, 13 Wall. 244, 20 L. Ed. 539; *Graham v. Norton*, 15 Wall. 427, 21 L. Ed. 177; *County of Greene v. Daniel*, 102 U. S. 187, 26 L. Ed. 99; *Davenport v. County of Dodge*, 105 U. S. 237, 26 L. Ed. 1018; *Rosenbaum v. Board (C. C.)* 28 Fed. 223; *U. S. ex rel. Reed v. Smallwood*, 1 Chi. Leg. N. 321, Fed. Cas. No. 16,315.

Without considering, therefore, in what cases, or to what extent, a review of the decision of the postmaster or of the Assistant Postmaster General, as respects the determination of the question of fact upon which the rating of postal matter depends, is either reviewable at all, or under a proceeding by mandamus (see *Carrick v. Lamar*, 116 U. S. 423, 6 Sup. Ct. 424, 29 L. Ed. 677), I must dismiss the application upon the ground first stated.

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## SECTION 55.—CERTIORARI IN THE FEDERAL COURTS

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### DEGGE et al. v. HITCHCOCK, Postmaster General.

Supreme Court of the United States. 1913. 229 U. S. 162, 33 S. Ct. 639, 57 L. Ed. 1135.

In 1909 complaint was made to the postal authorities that W. W. Degge and the Wellington corporations, of which he was president, were using the mails in furtherance of a fraudulent scheme. Notice was given to Degge and the corporations, and a hearing was had before the officer to whom, under the Postal Regulations, the disposition of this class of cases was committed. He found that the charges were true, and to his finding he attached a copy of all the evidence which had been taken. The report was confirmed by the Postmaster General, who issued an order directing the postmaster at Boulder, Colorado, not to deliver mail addressed to Degge or to these corporations, but to return all such letters to the sender with the word "Fraudulent" plainly



stamped on the envelop. Rev. Stat. §§ 3929, 4041, U. S. Comp. Stat. 1901, pp. 2686, 2749.

Degge, the corporations, and some of the stockholders, thereafter filed petitions in the supreme court of the District of Columbia, alleging that the officer before whom the hearing had been had was without power to make report on which the Postmaster General had acted; there was no testimony to show the existence of a fraudulent scheme, and no evidence whatever to support the finding. It was alleged that the order was arbitrary, in excess of the power of the Postmaster General, and void. The petitioners prayed that the court would issue writs of certiorari directing the Postmaster General to certify the record to the court, and that upon hearing and review thereof the court would set aside the order. A rule to show cause was granted. The Postmaster General demurred on the ground that the court was without jurisdiction to issue the writ, and subject thereto answered, attaching the record and the evidence on the hearing before the officer of the Post Office Department having charge of the fraud orders investigations.

The case was heard by the Supreme Court of the District of Columbia on petition, demurrer, and answer. After a hearing the court dismissed the case. The Court of Appeals of the District, without passing on the right to issue the writ, affirmed the judgment upon the ground that the evidence supported the order. The petitioners appealed, and on the argument in this court, the government renews the contention that the district court was without jurisdiction to issue the writ of certiorari to the Postmaster General.

Mr. Justice LAMAR, after making the foregoing statement, delivered the opinion of the court.

This case is the first instance, so far as we can find, in which a federal court has been asked to issue a writ of certiorari to review a ruling by an executive officer of the United States government. That at once suggests that the failure to make such application has been due to the conceded want of power to issue the writ to such officers. For, since the adoption of the Constitution, there have been countless rulings by heads of departments that directly affected personal and property rights, and where the writ of certiorari, if available, would have furnished an effective method by which to test the validity of quasi judicial orders under attack. The modern decisions cited to sustain the power of the court to act in the present case are based on state procedure and statutes that authorize the writ to issue not only to inferior tribunals, boards, assessors, and administrative officers, but even to the chief executive of a state in proceedings where a quasi judicial order has been made. But none of these decisions are in point in a federal jurisdiction where no statute has been passed to enlarge the scope of the writ at common law.

In ancient times it was used to compel the production of a record for use as evidence; more often to supplement a defective record in an appellate court, and later, to remove before judgment (*Harris v. Barber*, 129 U. S. 369, 32 L. Ed. 699, 9 S. Ct. 314), a record from a court

without jurisdiction, and with a view of preventing error rather than of correcting it. When, later still, its scope was enlarged so as to make it serve the office of a writ of error, certiorari was granted only in those instances in which the inferior tribunal had acted without jurisdiction, or in disregard of statutory provisions. But in those cases the writ ran to boards (*Reaves v. Ainsworth*, 219 U. S. 297, 55 L. Ed. 226, 31 S. Ct. 230), officers, tribunals, and inferior judicatures, whose findings and decisions, even though erroneous, had the quality of a final judgment, and there being no right of appeal or other method of review, the extraordinary writ of certiorari was resorted to from necessity to afford a remedy where there would otherwise have been a denial of justice. But in all those cases it ran from court to court—including boards, officers, or tribunals having a limited statutory jurisdiction, but whose judgments would be conclusive unless set aside.

The plaintiffs in error insist that under these common-law principles the writ should issue here because, having to act "upon evidence satisfactory to him" (Rev. Stat. § 3929), and notice and a hearing having been given, the Postmaster General acted in a judicial capacity in making the order, which was therefore subject to review on certiorari because he exceeded his jurisdiction, and, without any proof of fraud in the use of the mails, deprived plaintiffs in error of the valuable right to receive letters and money through the postoffice.

It is true that the Postmaster General gave notice and a hearing to the persons specially to be affected by the order, and that in making his ruling he may be said to have acted in a quasi judicial capacity. But the statute was passed primarily for the benefit of the public at large, and the order was for them and their protection. That fact gave an administrative quality to the hearing and to the order, and was sufficient to prevent it from being subject to review by writ of certiorari. The Postmaster General could not exercise judicial functions, and in making the decision he was not an officer presiding over a tribunal where his ruling was final unless reversed. Not being a judgment, it was not subject to appeal, writ of error, or certiorari. Not being a judgment, in the sense of a final adjudication, the plaintiffs in error were not concluded by his decision for had there been an arbitrary exercise of statutory power, or a ruling in excess of the jurisdiction conferred, they had the right to apply for and obtain appropriate relief in a court of equity. *American School v. McAnnulty*, 187 U. S. 94, 47 L. Ed. 90, 23 S. Ct. 33; *Philadelphia Co. v. Stimson*, 223 U. S. 620, 56 L. Ed. 576, 32 S. Ct. 340.

The fact that there was this remedy is itself sufficient to take the case out of the principle on which, at common law, right to the writ was founded. For there it issued to officers and tribunals only because there was no other method of preventing injustice. Besides, if the common-law writ, with all of its incidents, could be construed to apply to administrative and quasi judicial rulings, it could, with a greater

show of authority, issue to remove a record before decision, and so prevent a ruling in any case where it was claimed there was no jurisdiction to act. This would overturn the principle that, as long as the proceedings are in fieri, the courts will not interfere with the hearing and disposition of matters before the departments. *Plested v. Abbey*, 228 U. S. 42, 51, 57 L. Ed. 724, 33 S. Ct. 503. To hold that the writ could issue either before or after an administrative ruling would make the despatch of business in the departments wait on the decisions of the courts, and not only lead to consequences of the most manifest inconvenience, but would be an invasion of the executive by the judicial branch of the government.

The writ of certiorari is one of the extraordinary remedies, and being such it is impossible to anticipate what exceptional facts may arise to call for its use; but the present case is not of that character, but rather an instance of an attempt to use the writ for the purpose of reviewing an administrative order. *Public Clearing House v. Coyne*, 194 U. S. 497, 48 L. Ed. 1092, 24 S. Ct. 789. This cannot be done.

Affirmed.<sup>9</sup>

<sup>9</sup> See *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 S. Ct. 33, 47 L. Ed. 90 (1902), enjoining a postmaster from carrying out an order of the Postmaster General directing the detention of letters addressed to a corporation.

## CHAPTER 14

JURISDICTIONAL LIMITATIONS AND  
ADMINISTRATIVE FINALITY

## SECTION 56.—JURISDICTIONAL LIMITATIONS

## WARNE v. VARLEY et al.

Court of King's Bench, 1795. 6 Durn. &amp; E. 443.

TO an action of trespass for taking the plaintiff's goods (leather) and detaining them eighteen days, the defendants pleaded a justification under St. 2 Jac. I, c. 22, in which, after alleging that they were duly appointed according to the act to view and search all tanned hides, skins or leather that should be brought to Leadenhall Market and sworn to execute their office truly, and that Varley was also appointed a sealer under the act, they stated that the plaintiff, a tanner, on the 25th of November, 1795, offered for sale in Leadenhall Market the goods in question, which "had not after the tanning thereof been well and thoroughly dried in the judgment of the defendants according to the true intent and meaning of the said act of Parliament, wherefore the defendants by virtue of their office seized and carried away the said goods, and detained them in their custody until they might be duly tried in manner and form as is directed by the said statute, etc., and that within a reasonable and convenient time after the said seizure, to wit, on the 28th of November, the defendants gave notice of the seizure to the Lord Mayor of London, in order that triers might be appointed for trying the same according to the directions of the said act, etc.

The plaintiff replied that the said skins, after the tanning thereof and before they were put up to sale, had been well and thoroughly dried according to the true intent and meaning of the said act, and that after the seizure they were duly tried by six persons (naming them) duly appointed by the Lord Mayor to be triers, who upon their oaths determined that the leather had been well and thoroughly dried after the tanning according to the true intent and meaning of the act, and that the leather was afterwards restored to him.

LORD KENYON, C. J. I should have been glad to have found some ground on which the defendants' justification could have been supported, because they appear to have acted fairly and bona fide; but after comparing the pleadings with the act of Parliament, it is impossible to decide in their favor. This act was made early in the



time of James the First, when the trade of this country was in its infancy, and in a reign during which, notwithstanding what wits have said concerning the pedantry of the monarch, more wholesome acts of Parliament were made for the benefit of the trade of the country than in any subsequent period of the same duration. But this furnishes one of many examples that the wisest legislature in making a law do not foresee every possible case that may happen. I have no doubt but that, if the case in question had occurred to their minds when they framed this law, they would have provided for it. But, sitting in a court of law, we are bound to decide on the act of Parliament as we find it, and are not at liberty to introduce into it any regulations, however wise and proper they may appear to us. This statute, after directing that searchers shall be appointed, authorizes them to seize leather of a certain description, and to submit it to the future inquiry of the triers. It seems reasonable that, if these searchers exercise their authority *bona fide*, and only seize such leather for the examination of the triers as in their judgment ought to be examined, they should be protected; in such a case they do not transgress any moral duty, and I should have been glad to find that they had not transgressed any legal duty. But the act of Parliament affords them no such protection. It only empowers them to seize leather which is not dried, etc., according to the true intent and meaning of the act. Here the plea does not allege that the leather was insufficiently dried; and the replication does state expressly that it was sufficiently dried, etc., according to the true intent and meaning of this act. Therefore it appears on the record that the defendants seized leather which the statute did not authorize them to seize.

This case does not differ in principle from those alluded to of custom-house and excise officers. In those cases which more frequently occur, the legislature have gradually introduced new laws as the occasion called for them. Custom-house officers were, until a late act of Parliament (19 Geo. II, c. 34, § 16) was passed to protect them, liable to an action for seizing goods, if it ultimately turned out that the goods were not the subject-matter of seizure, even though there was a probable cause for seizing them. Excise officers continued in this situation to a later time, upon a supposition (I believe) that the statute respecting custom-house officers extended to them; and when it was discovered that they were not protected by the former act, the legislature made a similar law (23 Geo. III, c. 70, § 29) for their protection. So in the cases of justices of the peace (7 Jac. I, c. 3, 21 Jac. I, c. 12, and 4 Geo. II, c. 44) and constables the legislature have made laws in their favor when acting in the execution of their office. All these instances show the propriety of protecting persons acting under this act of Parliament when they act *bona fide*; but the legislature not having given them any protection except when they seize leather of a certain description, the only question is whether the leather in question was or was not

the subject of seizure; and that question is against the defendants by their own admission.

On the other point made at the bar, I am at a loss how to state a question about it. The injury done to the plaintiff is by the immediate act of the defendants, and not a consequence arising from some other act; for this trespass is the proper remedy. The authorities cited on behalf of the plaintiff show this. We are therefore bound to give judgment against the defendants.

ASHHURST, J. This seems to be a harsh proceeding against the defendants. They are bound to act under the terrors of a penalty, and it is hard that they should be liable in an action of trespass for a mere error in judgment; but the legislature have not provided for such a case. The act of Parliament only authorizes the searchers to seize goods of a certain denomination; the goods in question are not of that description; therefore the seizure is illegal, and consequently the defendants are trespassers.<sup>1</sup>

<sup>1</sup> See *Thompson v. Farrer*, 9 Q. B. D. 372, 384 (1882), per Cotton, L. J.: "The construction of the sixth section of the Merchant Shipping Act, 1876, is open to some difficulty. It has been contended that the vessel being in fact unsafe is a condition precedent to the exercise of all the powers given by the section. But this cannot, in my opinion, be the true meaning of the earlier part of the section which gives rise to this argument. For if this is the true construction, a vessel could not lawfully be detained, even for the purpose of being surveyed, unless she is in fact unsafe. This is inconsistent with the first subdivision, which expressly gives power to detain provisionally if the Board of Trade have reason to believe the ship is unsafe, and the contention is inconsistent with the first part of the section itself, which assumes that a ship coming under the provisions of this part of the section may be released, which in the case of a ship in fact unsafe would not be right. The section is not very correctly framed, but I think its meaning is that a ship which the Board of Trade have reason to believe to be unsafe may be detained, and after such investigation or inquiry as by the section is binding on the owner, either released or finally detained. The first part of the section in my opinion sums up, though not very accurately, the subsequent detailed provisions of the section. But though as a matter of public policy it was thought right that a power should be given to the Board of Trade to detain provisionally ships reasonably believed by the board to be unsafe, it was obvious that this might produce great hardship to owners of some vessels, and the tenth section gives in certain cases to owners of vessels which have been detained, and which in fact are not unsafe, compensation by way of damages for their detention, this compensation being payable, not by the officers of the board, but by the state out of the public purse."

The relevant portions of the act read as follows:

"6. Where a British ship, being in any port of the United Kingdom, is by reason of the defective condition of her hull, equipments, or machinery, or by reason of overloading or improper loading, unfit to proceed to sea without serious danger to human life, having regard to the nature of the service for which she is intended, any such ship (hereinafter referred to as 'unsafe') may be provisionally detained for the purpose of being surveyed and either finally detained or released as follows: (1) The Board of Trade, if they have reason to believe, on complaint or otherwise, that a British ship is unsafe, may provisionally order the detention of the ship for the purpose of being surveyed."

See, also, *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850 (1891), action of tort against members of board of health, for killing plaintiff's horse:

"The language of the material part of section 13 of the act of 1887 is: 'In all cases of farcy or glanders the commissioners, having condemned the animal

## THE QUEEN v. WOOD.

Court of Queen's Bench, 1855. 5 El. &amp; Bl. 49.

Phipson, on an earlier day in this term, obtained a rule nisi for a certiorari to remove the conviction of Mary Wood, after mentioned.

It appeared by affidavit that the Local Board of Health of Burslem, Staffordshire, established under the Public Health Act, 1848 (11 & 12 Vict. c. 63.), passed a by-law in the words following: "All occupiers of any premises within the district shall properly cleanse and remove all snow, or other obstructions, from the footpath and channel opposite their respective premises, before nine of the clock in the forenoon of each day."

Mary Wood, widow, the occupier of a mansion house and grounds surrounding the same, within the Burslem district, was summoned on the information of Thomas Povey, inspector of nuisances to the board, for breach of this by-law. On the return of the summons, her attorney admitted the breach of the by-law, by Mrs. Wood having neglected to clear some snow from the footpath and channel opposite to her house. No other obstruction was complained of. Mrs. Wood's attorney contended that the by-law was illegal. The magistrate, Thomas Bailey Rose, Esq., declined entering into this question, stating that, as the by-law had been allowed, it was his duty to carry it into effect; and he accordingly convicted Mrs. Wood.

Lord CAMPBELL, C. J. If the justice had heard the argument against the validity of the by-law, a difficulty might perhaps have arisen. But he did not do so; he held himself bound to act upon the by-law whether or not it was ultra vires of the Local Board to make such a by-law, inasmuch as it had been allowed under section 115. We think that, if the Local Board exceeded their powers in making the by-law, the justice exceeded his power in convicting, and that a certiorari may go, it being open to us to inquire as to the validity of the by-law. It would be monstrous to say that the allowance by the Secretary of State precludes such an inquiry. No power is given to him to legislate; he can only confer authority on a by-law made conformably to the statute. \* \* \*

infected therewith, shall cause such animal to be killed without an appraisal, but may pay the owner, or any other person, an equitable sum for the killing and burial thereof.' \* \* \* For these reasons, the literal, and, as we think, the true, construction of section 13 seems to us the only safe one to adopt, and accordingly we are of opinion that the authority and jurisdiction of the commissioners to condemn the plaintiff's horse under section 13 was conditional upon its actually having the glanders. If this be so, their order would not protect the defendants in a case where the commissioners acted outside their jurisdiction. *Fisher v. McGirr*, 1 Gray, 1, 45, 61 Am. Dec. 381. The fact as to the horse having the disease was open to investigation in the present action, and, on the finding that it did not have it, the plaintiff was entitled to a ruling that the defendants had failed to make out their justification."



ERLE, J. It is clear that, though the certiorari is taken away, there is an exception in the case where there is no jurisdiction. The question, therefore, is whether the by-law is good. Have the board, under section 55, any authority to remove all snow?<sup>2</sup> According to my opinion, they have not. Their power, as has been clearly pointed out by my Lord, is confined to things in the nature of manure. As to the general argument from expediency, it would, in my opinion, have been expedient to give a general power to remove snow; but it is not done. With respect to the jurisdiction of the magistrate, the case of *Regina v. Bolton*, 1 Q. B. 66, lays down the proper test. If the magistrate had no power to enter into the inquiry, we can correct what has been done. But, had the by-law been confined to "filth," and the magistrate had decided that snow was filth, we must, I think, have held the conviction good.<sup>3</sup>

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### McLEAN v. JEPHSON.

Court of Appeals of New York, 1890. 123 N. Y. 142, 25 N. E. 409, 9 L. R. A. 493.

RUGER, C. J. This was an application to the Supreme Court by the receiver of taxes in the city of New York, under section 857 of the city charter (chapter 410, Laws 1882), for a warrant to enforce the payment of a tax upon personal property by a nonresident. The section authorizing the proceeding reads as follows: "In case of the refusal or neglect of any person to pay any tax imposed on him for personal property, if there be no goods or chattels in his possession upon which the same may be levied by distress and sale according to law, and if the property assessed shall exceed the sum of one thousand dollars, the said receiver, if he has reason to believe that the person taxed has debts, credits, choses in action, or other personal property, not taxed elsewhere in this state and upon which levy cannot be made according to law, may thereupon, in his discretion, make application within one year to the court of common pleas of the county, or the Supreme Court, to enforce the payment of such tax."

The application was based upon a petition alleging the imposition of the tax upon the defendant in the year 1883, as a nonresident doing business and having capital invested therein, in the city of New York. An order to show cause why the relief asked should not be granted was issued and served upon the defendant, and, upon the return day thereof, he appeared and showed that he was at the time the alleged assessment was made, and for a long time previous thereto had been, a resident of the state of New Jersey, and had never trans-

<sup>2</sup> The section gives power to make by-laws for the removal of "all dust, ashes, rubbish, filth, manure, dung, and soil."

<sup>3</sup> As to this last point, see *Brittain v. Kinnaird*, 1 Br. & B. 432 (1819); *Mould v. Williams*, 5 Q. B. 469 (1844); *Calder v. Halket*, 3 Moore P. C. 28 (1839). See, also, *Queen v. Rose*, 24 L. J. Mag. Cas. 130 (1855).



acted business in the city of New York, except as the agent of a corporation organized and doing business in the state of New Jersey as a manufacturer of carriages; that the company had a wareroom in the city of New York for the exhibition and sale of its own manufactures; and that defendant had charge of such wareroom as its agent. These facts were undisputed, and must be considered as conclusively established in the further consideration of the case.

The authority of the assessors to make the assessment in question is claimed to have been derived from section 1, c. 37, Laws 1855, which reads as follows: "All persons and associations doing business in the state of New York as merchants, bankers, or otherwise, either as principals or partners, whether special or otherwise, and not residents of this state, shall be assessed and taxed on all sums invested in any manner in said business the same as if they were residents of this state, and said taxes shall be collected from the property of the firms, persons, or associations to which they severally belong."

This statute clearly defines the limits of the power possessed by the assessment officers, and their jurisdiction depends upon the existence of the facts stated in the statute. To authorize an assessment under this statute, it is indispensable that the person assessed shall, in fact, have money invested in a business carried on by him in this state, either as a principal or partner. Assessors cannot acquire jurisdiction to make such assessments by determining that they have it, and their authority to act must always depend upon the existence of the jurisdictional facts described in the statute. The facts stated conclusively show that the defendant was not doing such business in the city of New York, either as a principal or a partner, and that he did not have any money invested in the business there carried on. That business was carried on by the corporation of which the defendant was agent, and the money invested in it was the property of that corporation. \*The court below conceded that, if the facts stated had been known to the tax commissioners, they could not lawfully have made an assessment against the defendant; but it was claimed that the act of the commissioners in making it was judicial and could not be assailed collaterally, and that the defendant should have adopted some means, either by appearing before the tax commissioners when they sat to review assessments, and urged his nonliability to taxation, or, by certiorari from the determination of the assessors, raised the question of his liability.

There is no prerogative of the government which is more liable to abuse than that which authorizes it to seize and appropriate the property of the citizen for public purposes, and none which is regarded with more jealous scrutiny by the courts. The authority of its officers to exercise the powers of taxation has uniformly been carefully scrutinized and limited to the express warrant of the statute, and cannot be extended by implication or construction. This is especially the case where its demands may be enforced by fine and impris-

onment, and it would be contrary to the traditions of our people, as well as to principles of justice and law, to permit the liberty of the citizen to be jeopardized by a strained and doubtful construction of a statute. The defendant has, confessedly, been assessed upon property which he did not own, and is now threatened with imprisonment, unless he pays the illegal exaction. The only authority the tax commissioners had to assess the personal property of a nonresident was in the event that he employed it in carrying on a business in this state, as principal or partner. But the defendant had been taxed upon an investment which he never made, and upon a business carried on by other parties. This has been done upon the theory not that he had property and was carrying on such business, but because he was negligent in failing to examine the assessment lists, and, by omitting to do so and obtaining a correction of them, has been rendered liable to the payment of a tax on property which he did not own. The property assessed could not have been taken for the payment of this tax, as it did not belong to the person against whom it was levied, and the strange anomaly is presented of an assessment against a person for property which he did not own, under an act which authorizes an assessment only upon his property invested in business, and in respect to property which could not be taken in payment for the tax, although such property alone is pointed out by the act as the fund from which the tax is to be collected. Upon such a foundation is built up a personal claim against the alleged taxpayer, which is sought to be enforced by imprisonment. The ground upon which it is claimed to be sustainable, is that the tax commissioners have decided that he was a taxpayer, and, in so doing, acted judicially, and therefore their determination cannot be attacked collaterally.

It is argued that, public notice by publication having been given that the assessment rolls of New York City had been completed and would be open for inspection and review at a certain time and place in that city, the defendant, having failed to examine them and to procure a correction of the erroneous assessment, was precluded from questioning the validity of such assessment in this proceeding. We are of the opinion that the defendant was under no obligation to examine the assessment lists of the city of New York. It is not claimed that the notices published by the assessors contained any intimation that an assessment had been made against the defendant, or that he had personal notice, in any other form, of the making of such assessment. There was no law making the defendant liable to taxation in New York, and no foundation for a claim that he knew, or had any reason to suppose, that an assessment had been made against him. He was under no greater obligation to examine the assessment lists of New York City than any other of the thousands of citizens of other states who visited that city during the year 1883. A person subject to taxation in a particular place may well be held liable for an erroneous assessment if he neglects to examine

the rolls and obtain correction of errors therein; but a nonresident, having no taxable property in such locality and no just reason to suppose he has been taxed, is under no such obligation. He may safely rely upon his immunity from taxation in any place where he does not reside, and is not compelled to anticipate and thwart the act of public officers proceeding without authority of law in such places. The published notices of the completion of assessment rolls, required by the statute, are intended for the information of taxpayers within the jurisdiction of the particular assessment officers, and can have no operation upon nonresidents of such locality who have no property liable to taxation therein.

We think the authorities are clearly adverse to the decision of the court below. It is conceded that the question depends upon the fact whether the assessors had jurisdiction to make the assessment. If they had not, then the assessment is confessedly void. Assessors are ministerial officers, and do not generally act judicially in the performance of their duties. Having, however, acquired jurisdiction of the person and subject-matter liable to be taxed, certain questions may arise which are necessarily judicial in character, and in respect to such questions their action is necessarily final, unless their determinations be directly assailed. Instances of such questions are the fixing of the value of property assessed, and determining the extent of a claim to exemption, where the person assessed is liable to be taxed. *Weaver v. Devendorf*, 3 Denio, 118.

The authorities in this state seem to be quite uniform, to the effect that the question whether persons or property are assessable under the statutes is a jurisdictional question, and is always open to inquiry when the authority to make an assessment is assailed.

The case of *Dorn v. Backer*, 61 N. Y. 261, cannot, we think, on principle, be distinguished from this case. That was an action against the assessor to recover damages for wrongfully assessing the plaintiff's farm, in the town of Ava. The farm lay partly in Ava, and partly in Boonville. It was assessable in the township where he resided. He had formerly occupied a house upon that part of his farm lying in the town of Ava. Subsequently, he removed into a small house built on the land in Boonville, and had apparently resided there some years. It was there declared: "It may be said now to be settled that assessors cannot acquire jurisdiction by deciding that they have it. Before assessing the plaintiff for taxation in the town of Ava, it was essential that he should be a resident of that town, and, if not, they had no jurisdiction." It was held that the action was sustainable.

In *Bank v. City of Elmira*, 53 N. Y. 49, the action was to recover damages for the conversion of plaintiff's property. The defendant justified under an allegation that the property was taken by its collector to satisfy a tax duly imposed upon the capital of the bank by the assessors of the city. Under the law (chapter 761, Laws 1866) the capital of a bank was not assessable. The late Chief Judge Church, writing the opinion of the court, says: "It is claimed that the asses-



sors had jurisdiction to make the assessment; that their act was judicial, and, although erroneous, is conclusive until reversed by a direct proceeding instituted for that purpose. This proposition cannot be predicated of this case, either in fact or in law. Some of the duties of assessors are judicial in their nature, and as to them, while acting within the scope of their authority, they are protected from attack, collaterally, to the same extent as other judicial officers; but they are subordinate officers, possessing no authority, except such as is conferred upon them by statute, and it is a well-settled and salutary rule that such officers must see that they act within the authority committed to them. \* \* \* So, when their right to act depends upon the existence of some fact which they erroneously determine to exist, their acts are void. \* \* \* This court held, in 15 N. Y. 316, that, if the assessors erred in determining whether a person was a taxable inhabitant of a town, they did so at their peril, and were liable to an action by the party aggrieved. This was upon the principle that the act, although judicial in its nature and requiring the exercise of judgment, was nevertheless necessary to confer jurisdiction, which could not be conferred by an erroneous decision."

The case of *Mygatt v. Washburn*, 15 N. Y. 316, referred to, was an action by the taxpayer against the assessor for an illegal assessment. The plaintiff had been a resident of the town of Oxford until the last of May, when he removed to the county of Oswego. The time for making assessments in Oxford covered the months of May and June and the plaintiff's name was entered on the assessment lists in May. It was held that the status of the taxpayer as to residence did not become irrevocably fixed until after July 1st. Judge Denio says: "The plaintiff, therefore, was not subject to the jurisdiction of the assessors. In placing his name on the roll, and adding thereto an amount as the value of his personal property, they acted without authority. They are, therefore, responsible to the plaintiff for the damages which ensued. It was not, in the view of the law, an error of judgment."

In view of the fact that the authorities on this point are all uniform, we will only refer to *In re New York Catholic Protectory*, 77 N. Y. 342, because it recognizes, as an established principle, that the determination by assessors that a person or his property are taxable, is jurisdictional, and that an error made by them in such determination against the taxpayer is fatal to the validity of the assessment. Judge Rapallo, writing the opinion of the court, says: "By the act amending their charter (section 3, c. 647, Laws 1866), it is provided that 'the real and personal estate belonging to, and used for the charitable purposes of, said association shall be exempt from taxation.' That the land upon which the tax in question was imposed belonged to the petitioners, and was used for such charitable purposes, is alleged in the petition, and not controverted in any manner. The assessors, consequently, had no jurisdiction to assess that land; and, even if they be deemed to have determined as a fact that the land was not so used as to bring it within the exception, their determination was not con-



clusive, the fact being one upon which their jurisdiction depended. If the jurisdictional fact did not exist, the determination of the assessors could not establish jurisdiction in them."

The assessment officers in this case had authority to assess the property of a nonresident doing business in this state as a principal, or partner having money invested in the business, and in such case only. Their authority to assess depended upon the fact that he was engaged in business, and not upon appearances which might be deceptive and uncertain. The defendant, concededly, was not a principal or partner in any business conducted in this state, and had no money invested in such business. His principal might have been engaged in such business, and might have been liable to taxation; but even as to that there is some question. *People ex rel. Parker Mills v. Commissioners of Taxes*, 23 N. Y. 242. But the defendant was not only not liable to be assessed, but the case does not show that there were any reasonable grounds for supposing that he was engaged in a business making him liable to taxation. He was a nonresident, and did not own the property assessed, and did not appear to be carrying on business in any capacity except as the agent of a responsible principal located in another state.

Without discussing other questions in the case, which might possibly be reviewed upon the record, we are, for the reasons stated, of the opinion that the orders of the courts below should be reversed. The orders of the General and Special Terms should be reversed, and the application of the petitioner denied, with costs in all courts. All *concur*.<sup>4</sup>

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### HARRINGTON v. GLIDDEN.

Supreme Judicial Court of Massachusetts, 1901. 179 Mass. 486, 61 N. E. 54, 94 Am. St. Rep. 613.

Exceptions from superior court, Middlesex county.

Action by one Harrington, as collector of taxes, against one Glidden. From a judgment for plaintiff, defendant brings exceptions. Overruled.

HAMMOND, J. In this action the plaintiff, as collector, seeks to recover a tax assessed upon the defendant, as trustee. It is contended by the defendant that, even if he was a trustee, such was the nature and location of the property, and his relation to it, that he was not taxable as such.

The first question is whether this ground of the defense is open to the defendant in this action. The assessment and collection of taxes is regulated by statute. The assessors are public officers,

<sup>4</sup> Compare *Easton v. Calendar*, 11 Wend. (N. Y.) 90 (1833).

See, also, *Rooke v. Withers*, 5 Coke Rep. 99b (1598); *Nichols v. Walker*, Cro. Car. 394 (1634); *Terry v. Huntington*, Hardres, 480 (1668).

Jurisdictional error in audit and allowance of claims, see *Board of Supervisors of Richmond County v. Ellis*, 59 N. Y. 620 (1875).

and, while their duties are of a quasi judicial nature, their jurisdiction is limited, based sometimes upon the residence of the person assessed, or of some other person interested in the property, and sometimes upon the situation of the property. Without reciting in detail the statutes, it is sufficient to say that they provide that each person may bring in a sworn list of the personal property for which he in any capacity should be taxed, and this list is to be received by the assessors as true, except as to valuation, unless he, being required thereto by the assessors, refuses to answer on oath all necessary inquiries as to the nature and amount of his property. In case a person does not bring in a list, the assessors shall ascertain, as nearly as possible, his taxable property, and "make an estimate thereof at its just value, according to their best information and belief," and "such estimate shall be conclusive," except in certain cases not here material. Pub. St. c. 11, §§ 38-42. Any person aggrieved by an assessment may apply for an abatement to the assessors, and, by appeal from their decision, to the county commissioners or superior court, and on questions of law may reach this court; but no person shall have an abatement unless he files a list, as above provided. Id. §§ 69-72; St. 1890, c. 127.

This plain, adequate, and complete remedy for the correction of errors, whether of law or fact, is the only one provided by our statutes; and when the assessors are acting within their jurisdiction, it must be regarded as exclusive, in accordance with the well-known rule that "when a new right is created by statute, which at the same time provides a remedy for any infringement of it, that remedy must be pursued." *Osborn v. Danvers*, 6 Pick. 98, 99.

But when the assessors are acting outside their jurisdiction, their acts are absolutely void. Where, for instance, the tax ordered is illegal because for a purpose not authorized by law, the assessment is void. The assessors have no jurisdiction. *Bangs v. Snow*, 1 Mass. 181; *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145.

So where the assessment is upon a nonresident for personal property, claimed, by reason of its location in the town where the assessment is made, to be taxable there, if it appears that the nonresident had no personal property assessable there, the tax is wholly void, even if he had taxable real estate there. The reason is that, the person assessed not being resident in the town where the assessment is made, and so not within the jurisdiction of the assessors, their right to assess him, so far as respects personal property, depends upon whether he has assessable personal property in the town. Unless he has such property there, their acts are void for want of jurisdiction.

*Preston v. City of Boston*, 12 Pick. 7, a leading case, affords a good illustration of the application of this principle. The plaintiff being domiciled in Medford, and having taxable personal estate, but having in Boston only real estate, was taxed in the latter place for both real and personal estate. He paid the taxes, and in an action to recover back the money it was held that, while the real estate tax was valid the

personal estate tax was invalid, and he recovered that back. The ground of the decision as to the personal property was that the plaintiff was not an inhabitant of Boston, and so not liable to be taxed there at all on his personal property. As to that the assessors had no jurisdiction. In giving the opinion, Shaw, C. J., said: "One not liable—not domiciled—is not within the jurisdiction of the assessors any more than a stranger from another state who should happen to be lodging at a hotel when the tax was assessed. The whole proceeding, therefore, in regard to him was without authority *ab initio*." See, also, *Sumner v. Dorchester Parish*, 4 Pick. 361; *Inglee v. Bosworth*, 5 Pick. 498, 16 Am. Dec. 419.

Where, however, there is personal property of a nonresident which is taxable in the town where it is situated, the assessors of that town have jurisdiction, and consequently the only remedy of the person aggrieved is by abatement. *Little v. Greenleaf*, 7 Mass. 236; *Gray v. Kettell*, 12 Mass. 161. Again, where a corporation owns real and personal estate, and is taxable for the real, and not for the personal, estate, a tax upon the personal estate is absolutely void. *Manufacturing Co. v. Amesbury*, 17 Mass. 461; *Boston Water Power Co. v. City of Boston*, 9 Metc. 199; *Salem Iron Co. v. Inhabitants of Danvers*, 10 Mass. 514—the ground of the decision in these cases being that the corporation is not an inhabitant of the town for purposes of taxation. And the same principle is applied where the assessors undertake to assess a tax in excess of what is called for or is allowed by law. *Joyner v. Inhabitants of Egremont School Dist. No. 3*, 3 Cush. 567; *Cone v. Forrest*, 126 Mass. 98.

These and similar cases all proceed upon the principle that an assessment made by assessors who have no jurisdiction is not the assessment authorized by statute. It is no assessment at all, and is absolutely void. As it is not the statutory proceeding, the statutory remedy is not exclusive.

Such an assessment, therefore, can be attacked collaterally in an action of tort against the assessors, where such an action will lie, or in an action against the town to recover back the money paid, or in defense to an action by the collector. These general remedies are not for those who are aggrieved by assessors acting within their jurisdiction, but are allowable to redress wrongs inflicted by persons who pretend to be assessors, but who are not such, because acting without jurisdiction.

Where, however, the tax is for a legal purpose, and the assessors have jurisdiction, whether it is based upon the fact that the person assessed be an inhabitant of the town where the assessment is made, or upon the situation of the property, or any other jurisdictional fact shown to exist, and they proceed essentially in accordance with the statutes, their decision as to the nature and amount of the taxable property of a person who has not brought in a list is valid. It cannot be attacked in any collateral proceeding, but must stand until changed in a proceeding under the statute for abatement. There are

sound and obvious reasons for this rule, which are set forth at some length in *Lincoln v. City of Worcester*, 8 Cush. 55, 65, 66 [ante, p. 403].

Among the numerous cases where the doctrines above stated have been applied by this court, see, in addition to those already cited, *Bates v. City of Boston*, 5 Cush. 93; *Howe v. Same*, 7 Cush. 273; *Bourne v. Same*, 2 Gray, 494; *Ingram v. Cowles*, 150 Mass. 155, 23 N. E. 48; *Carleton v. Ashburnham*, 102 Mass. 348.

The defendant in the case at bar was an inhabitant of Lowell, and he had taxable personal property there. The only list he brought to the assessors was that of February 24, 1890, several months after the warrant had been committed to the collector, and even that purported to relate only to the property held by him as trustee. Being an inhabitant of the city, and having taxable personal property there, he was within the jurisdiction of the assessors. While the tax was in part against him as an individual, and in part as trustee, still it was all a personal tax. If valid, the collector could sue, distrain, or arrest, as well for the one part as for the other.

The assessors called for a sworn list of taxable personal property. Such a list should contain all such property held by a person either as an individual or in a representative capacity. In the absence of such a list from the defendant, the assessors proceeded to consider his case. They had before them not only the question whether he was taxable for any personal property held by him as an individual, but also whether he was taxable for any such property held by him in a representative capacity. The whole case was before them, and it was their duty to investigate and decide it. That duty they performed, and they decided that he had taxable personal property, not only as an individual, but as a trustee, and they made an estimate thereof. The jury have found that in performing this work they "ascertained, as nearly as possible, the particulars of the personal estate held by the defendant as trustee, for the purpose of making this assessment," and that, "having obtained these particulars, they estimated such property at its just value, according to their best information and belief."

We are of opinion that the evidence fully justifies the finding. Indeed, the assessors seem to have been impressed with the importance and magnitude of the question, and to have made unusual efforts to get at the facts, both as to the nature and value of the property. It is true that a tax upon real estate is separate and distinct from that on personal estate (*Preston v. City of Boston*, *ubi supra*), but we do not think the statutes intended that there should be a division of the tax on personal estate, so far as concerns the remedy for a person aggrieved.

We are not unmindful of the case of *Dorr v. City of Boston*, 6 Gray, 131. In that case it appeared that the plaintiff was a woman, and had no taxable property in this state. As to whether the case



of *Preston v. City of Boston*, *ubi supra*, was rightly interpreted in that case, see *Lincoln v. City of Worcester*, 8 Cush. 62, and *Bates v. City of Boston*, 5 Cush. 97.

So far, therefore, as respects the nature and value of the property, and his relation to it, the grievance of the plaintiff, if any, is one of overvaluation, and his only remedy is by the statutory proceeding for abatement. He cannot avail himself of this portion of his defense in this action. *Pierce v. Eddy*, 152 Mass. 594, 596, 26 N. E. 99. \* \* \*

The defendant's brief contains an elaborate argument in support of the proposition that our statutes relating to the assessment of taxes are unconstitutional, because they do not give the party assessed an opportunity to be heard. But he does have full opportunity to be heard before the assessing board, if he desires it, before the demand becomes conclusively established against him, and that is enough. *Cooley, Tax'n*, pp. 361, 363, 364, and cases cited.<sup>5</sup>

There was ample evidence of a demand upon which to base interest, and, in the absence of anything to the contrary in the brief of the defendant, we consider the exception on that point waived.

Without going over the exceptions further in detail, it is sufficient to say that we see no error of law made by the presiding judge at the trial.

Exceptions overruled.

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### KANSAS HOME INS. CO. v. WILDER.

'Supreme Court of Kansas, 1890. 43 Kan. 731, 23 Pac. 1061.

JOHNSTON, J. Two cases between the same parties are submitted together upon a single statement of facts, and according to the stipulation of the parties only two legal propositions are presented for decision. The first one of these is whether the courts can inquire into and control the superintendent of insurance in the exercise of his official duties in granting, refusing, or revoking a certificate of authority to a mutual fire insurance company organized under chapter 132 of the Laws of 1885. Prior to the legislative session of 1889, the finding and judgment of the superintendent in respect to the solvency of an insurance company, and its compliance with the requirements of law, could not be controlled, and when he had exercised his discretion and judgment it could not be reviewed, nor the motives which actuated him inquired into by the courts. *Insurance Co. v. Wilder*, 40 Kan. 561, 20 Pac. 265.

The decision in the cited case, construing the statute with reference to the power and discretion of the superintendent, was given in January, 1889, and the Legislature, which convened in the same month, materially modified the statute, prescribing the power and duties of

<sup>5</sup> On this point, see *Glidden v. Harrington*, 189 U. S. 255, 23 Sup. Ct. 574, 47 L. Ed. 798 (1903).

the superintendent in dealing with mutual fire insurance companies. In section 24, c. 132, Laws 1885, provision was made that, whenever it should appear to the superintendent of insurance that the solvency of a mutual fire insurance company was impaired, or that the insurance laws of the state were being violated, he should immediately make an examination, and for that purpose should have access to all the books and papers of the company, and have power to administer oaths and examine witnesses. It then proceeds: "*If the superintendent of insurance shall find*, upon such examination, that the solvency of the company has been impaired, or that the laws of the state have been violated, he shall immediately suspend the certificate of authority until the laws of the state have been fully complied with, or the solvency of the company restored; or, if in his judgment the public safety require it, he may revoke the certificate of authority, and cause the company to be enjoined from further insuring of property."

This section was amended by chapter 159 of the Laws of 1889, [by] which, after providing for reports and examinations substantially as in the original section, the provision above quoted is changed so as to read as follows: "If the solvency of such company has been impaired, or the laws of the state have been violated, by the company, the superintendent of insurance shall immediately suspend the certificate of authority until the laws of the state have been fully complied with, or the solvency of the company restored; and he also may in such a case revoke the certificate of authority, and cause the company, upon proper proceedings instituted against it, to be enjoined from further insuring of property." Provisos are then added which, in substance, state that the superintendent cannot refuse an insurance company a certificate of authority to do business in the state, or revoke or suspend a certificate already granted to such a company, if it is solvent, and has complied and is complying with the laws of the state. And the provisos further recognize that actions may be brought against the superintendent of insurance in the county where his office is located, to compel him to issue certificates of authority to an insurance company, and to restrain him from revoking or suspending a certificate of authority which had been theretofore granted.

The language in the statute of 1885 which we have italicized was omitted in the amendment of 1889. In the earlier provision, the license or certificate of authority might be suspended on the mere finding of the superintendent that the solvency of the company had been impaired, and it might be revoked solely upon his judgment that the public safety required it. The language authorizing the suspension or revocation of a certificate of authority upon the mere finding and discretion of the superintendent is carefully excluded from the later provision. These changes, together with the provisions forbidding the refusal, revocation, or suspension of a certificate of authority by the superintendent, where the company is solvent, and has complied with all the laws of the state, as well as the proviso which recognizes that

an action of mandamus may be brought to compel the superintendent to issue certificates of authority, and an action of injunction may be brought against him to enjoin him from revoking or suspending certificates of authority, indicate quite clearly the legislative purpose that, in the future, the determination and action of the superintendent should not be final and conclusive, so far as mutual fire insurance companies are concerned.

The fact that the law was amended so soon after a judicial construction had been placed upon it is not to be overlooked in ascertaining the object of the Legislature in enacting the amended law. By changing the language of the statute, the Legislature has indicated a purpose to change the rule of the former statute, and that the new is to have a different construction than had already been placed upon the old one. This circumstance, and the changes in the phraseology that were made, manifest a legislative purpose to make the determination of the superintendent, as to the right of a mutual fire insurance company to begin or continue business, subject to judicial inquiry and control. If this was not the effect, then the amendment was for no purpose; and it is contended here that no actual change was made or intended by the amendment. But we cannot presume that the "Legislature intended to go through the form and time and expense of legislation to accomplish nothing, or to do that already fully and completely done." *City of Emporia v. Norton*, 16 Kan. 236. The first question presented must therefore be decided in the affirmative. \* \* \*

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### GONZALES v. WILLIAMS.

Supreme Court of United States, 1904. 192 U. S. 1, 24 S. Ct. 177, 48 L. Ed. 317.

Appeal from the Circuit Court of the United States for the Southern District of New York to review an order dismissing a writ of habeas corpus to inquire into the detention by the immigration commissioner of a native of Porto Rico at the port of New York as an alien immigrant. Reversed and remanded, with directions to discharge the immigrant.

Mr. Chief Justice FULLER delivered the opinion of the court.

This is an appeal by Isabella Gonzales from an order of the Circuit Court of the United States for the Southern District of New York, dismissing a writ of habeas corpus issued on her behalf, and remanding her to the custody of the United States commissioner of immigration at the port of New York. 118 F. 941.

Isabella Gonzales, an unmarried woman, was born and resided in Porto Rico, and was an inhabitant thereof on April 11, 1899, the date of the proclamation of the Treaty of Paris (30 Stat. 1754). She

\* Compare *Martin v. Mott*, 12 Wheat. 19, 6 L. Ed. 537 (1827).

arrived at the port of New York from Porto Rico August 24, 1902, when she was prevented from landing, and detained by the immigration commissioner at that port as an "alien immigrant," in order that she might be returned to Porto Rico if it appeared that she was likely to become a public charge.

If she was not an alien immigrant within the intent and meaning of the act of Congress entitled "An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor," approved March 3, 1891 (26 Stat. 1084, c. 551 [U. S. Comp. St. 1901, pp. 1294, 1296]), the commissioner had no power to detain or deport her, and the final order of the Circuit Court must be reversed.

The act referred to contains these provisions:

"That the following classes of aliens shall be excluded from admission into the United States, in accordance with the existing acts regulating immigration, other than those concerning Chinese laborers: All idiots, insane persons, paupers, or persons likely to become a public charge. \* \* \*

"Sec. 8. That, upon the arrival by water at any place within the United States of any alien immigrants it shall be the duty of the commanding officer and the agents of the steam or sailing vessel by which they came to report the name, nationality, last residence, and destination of every such alien, before any of them are landed, to the proper inspection officers. \* \* \* All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final, unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury. It shall be the duty of the aforesaid officers and agents of such vessel to adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers, and any such officer or agent or person in charge of such vessel who shall either knowingly or negligently land, or permit to land, any alien immigrant at any place or time other than that designated by the inspection officers, shall be deemed guilty of a misdemeanor. \* \* \*

"Sec. 10. That all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. \* \* \*

"Sec. 11. That any alien who shall come into the United States in violation of law may be returned as by law provided. \* \* \*

The treaty ceding Porto Rico to the United States was ratified by the Senate February 6, 1899; Congress passed an act to carry out its obligations March 2, 1899 (30 Stat. 993, c. 376); and the ratifications were exchanged and the treaty proclaimed April 11, 1899 (30 Stat. 1754). Then followed the act entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and



for other purposes," approved April 12, 1900. 31 Stat. 77, c. 191.  
\* \* \*

By section 7 the inhabitants of Porto Rico, who were Spanish subjects on the day the treaty was proclaimed, including Spaniards of the Peninsula who had not elected to preserve their allegiance to the Spanish crown, were to be deemed citizens of Porto Rico, and they and citizens of the United States residing in Porto Rico were constituted a body politic under the name of the People of Porto Rico.

Gonzales was a native inhabitant of Porto Rico and a Spanish subject, though not of the Peninsula, when the cession transferred her allegiance to the United States, and she was a citizen of Porto Rico under the act. And there was nothing expressed in the act, nor reasonably to be implied therefrom, to indicate the intention of Congress that citizens of Porto Rico should be considered as aliens, and the right of free access denied to them.

Counsel for the government contends that the test of Gonzales' rights was citizenship of the United States, and not alienage. We do not think so, and, on the contrary, are of opinion that, if Gonzales were not an alien within the act of 1891, the order below was erroneous.

Conceding to counsel that the general term "alien," "citizen," "subject," are not absolutely inclusive, or completely comprehensive, and that, therefore, neither of the numerous definitions of the term "alien" is necessarily controlling, we, nevertheless, cannot concede, in view of the language of the treaty and of the act of April 12, 1900, that the word "alien," as used in the act of 1891, embraces the citizens of Porto Rico.

We are not required to discuss the power of Congress in the premises; or the contention of Gonzales' counsel that the cession of Porto Rico accomplished the naturalization of its people; or that of Commissioner Degetau, in his excellent argument as *amicus curiæ*, that a citizen of Porto Rico, under the act of 1900, is necessarily a citizen of the United States. The question is the narrow one whether Gonzales was an alien within the meaning of that term as used in the act of 1891.

The act excludes from admission into the United States, "in accordance with the existing acts regulating immigration other than those concerning Chinese laborers," certain classes of "aliens" or "alien immigrants" arriving at any place within the United States, in respect of all of whom it is required that the commanding officer and agents of the vessel by which they come shall report the name, nationality, last residence and destination before any are landed.

The decisions of the inspection officers adverse to the right to land are made final unless an appeal is taken to the superintendent of immigration, whose action is subject to review by the Secretary of the Treasury; and all aliens who unlawfully come into the United

States in violation of law shall be immediately, if practicable, sent back, or may be returned as by law provided.

We think it clear that the act relates to foreigners as respects this country, to persons owing allegiance to a foreign government, and citizens or subjects thereof, and that citizens of Porto Rico, whose permanent allegiance is due to the United States, who live in the peace of the dominion of the United States, the organic law of whose domicile was enacted by the United States, and is enforced through officials sworn to support the Constitution of the United States, are not "aliens," and upon their arrival by water at the port of our mainland are not "alien immigrants," within the intent and meaning of the act of 1891. \* \* \*

And in the present case, as Goñzales did not come within the act of 1891, the commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary; and she was not obliged to resort to the superintendent or the Secretary.

Our conclusion is not affected by the provision in the sundry civil act of August 18, 1894 (28 Stat. 372, 390, c. 301 [U. S. Comp. St. 1901, p. 1303]), in relation to the finality of the decision of the appropriate immigration or custom officers, or the similar provision in the act "to regulate the immigration of aliens into the United States," approved March 3, 1903 (32 Stat. 1213, c. 1012 [U. S. Comp. St. Supp. 1903, p. 170]). The latter act was approved after the Gonzales litigation was moved, but it is worthy of notice that the words "United States" as used in the title and throughout the act were required to be construed to mean "the United States and any waters, territory, or other place now subject to the jurisdiction thereof." Section 33. The definition indicates the view of Congress on the general subject.

Gonzales was not a passenger from a foreign port, and was a passenger "from territory or other place" subject to the jurisdiction of the United States.

In order to dispose of the case in hand, we do not find it necessary to review the Chinese exclusion acts and the decisions of this court thereunder.

Final order reversed, and cause remanded, with a direction to discharge Gonzales.

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NG FUNG HO et al. v. WHITE, Commissioner of Immigration, etc.  
Supreme Court of the United States, 1922. 259 U. S. 276, 42 S. Ct. 492, 66 L. Ed. 938.

Habeas corpus proceedings by Ng Fung Ho, otherwise known as Ung Kip, and others, against Edward White, as Commissioner of Immigration for the Port of San Francisco. A judgment of the District Court, quashing the writ and remanding petitioners to the custody of immigration authorities, was affirmed by the Circuit Court of

Appeals (266 F. 765), and petitioners bring certiorari. Judgment affirmed in part, and reversed in part, with directions to issue the writ as to two petitioners.

Mr. Justice BRANDEIS delivered the opinion of the Court. \* \* \*

Second. As to Gin Sang Get and Gin Sang Mo a constitutional question also is presented. Each claims to be a foreign-born son of a native-born citizen, and hence, under section 1993 of the Revised Statutes (Comp. St. § 3947), to be himself a citizen of the United States. They insist that, since they claim to be citizens, Congress was without power to authorize their deportation by executive order. If at the time of the arrest they had been in legal contemplation without the borders of the United States, seeking entry, the mere fact that they claimed to be citizens would not have entitled them under the Constitution to a judicial hearing. *United States v. Ju Toy*, 198 U. S. 253, 25 S. Ct. 644, 49 L. Ed. 1040; *Tang Tun v. Edsell*, 223 U. S. 673, 32 S. Ct. 359, 56 L. Ed. 606. But they were not in the position of persons stopped at the border when seeking to enter this country. Nor are they in the position of persons who entered surreptitiously. See *United States v. Wong You*, 223 U. S. 67, 32 S. Ct. 195, 56 L. Ed. 354. They arrived at San Francisco, a regularly designated port of entry, were duly taken to the immigration station, and, after a protracted personal examination, supplemented by the hearing of witnesses and the examination of reports of immigration officials, were ordered admitted as citizens. Then they applied for and received their certificates of identity. Fifteen months after the entry of one and six months after the entry of the other, both were arrested, on the warrant of the Secretary of Labor, in Arizona, where they were then living.

The constitutional question presented as to them is: May a resident of the United States who claims to be a citizen be arrested and deported on executive order? The proceeding is obviously not void ab initio. *United States v. Sing Tuck*, 194 U. S. 161, 24 S. Ct. 621, 48 L. Ed. 917. But these petitioners did not merely assert a claim of citizenship. They supported the claim by evidence sufficient, if believed, to entitle them to a finding of citizenship. The precise question is: Does the claim of citizenship by a resident, so supported both before the immigration officer and upon petition for a writ of habeas corpus, entitle him to a judicial trial of this claim?

The question suggests—but is<sup>6</sup> different from—another concerning deportation proceedings on which there is much difference of opinion

<sup>6</sup> In *Moy Suey v. United States*, 147 F. 697, 78 C. C. A. 85, where a Chinaman who claimed to have been born in the United States was ordered deported by the commissioner because he found that the prisoner had not "satisfactorily established by affirmative proof his lawful right to be and remain in the United States," the order of deportation was reversed by the Circuit Court of Appeals for the Seventh Circuit, because one within the country claiming to be a citizen "may not be deported or banished until the right of the government to deport or banish has been judicially determined." This decision was followed in *Gee Cue Beng v. United States*, 184 F. 383, 106 C. C. A. 493 (C. C. A., Fifth Circuit); *Fong Gum Tong v. United States*, 192 F. 320, 112 C. C. A. 572; *United*

in the lower courts, namely: whether the provision which puts upon the detained the burden of establishing his right to remain (see section 3 of the Act of May 5, 1892 [Comp. St. § 4317]; *Chin Bak Kan v. United States*, 186 U. S. 193, 22 S. Ct. 891, 46 L. Ed. 1121; *Ah How v. United States*, 193 U. S. 65, 24 S. Ct. 357, 48 L. Ed. 619) applies where one resident within the country is arrested under the provisions of the Chinese Exclusion Law and claims American citizenship. There the proceeding for deportation is judicial in its nature. It is commenced usually before a commissioner of the court, but on appeal to the District Court additional evidence may be introduced, and the trial is *de novo*. *Liu Hop Fong v. United States*, 209 U. S. 453, 28 S. Ct. 576, 52 L. Ed. 888. The constitutional question presented in those cases is merely how far the Legislature may go in prescribing rules of evidence and burden of proof in judicial proceedings. *Fong Yue Ting v. United States*, 149 U. S. 698, 729, 13 S. Ct. 1016, 37 L. Ed. 905; *Bailey v. Alabama*, 219 U. S. 219, 238, 31 S. Ct. 145, 55 L. Ed. 191; *Luria v. United States*, 231 U. S. 9, 26, 34 S. Ct. 10, 58 L. Ed. 101; *Hawes v. Georgia*, 258 U. S. 1, 42 S. Ct. 204, 66 L. Ed. 431, decided February 27, 1922. Here the proceeding is throughout executive in its nature.

Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service. It is well settled that in such a case a writ of habeas corpus will issue to determine the status. *Ex parte Reed*, 100 U. S. 13, 25 L. Ed. 538; *In re Grimley*, 137 U. S. 147, 11 S. Ct. 54, 34 L. Ed. 636; *In re Morrissey*, 137 U. S. 157, 11 S. Ct. 57, 34 L. Ed. 644; *Johnson v. Sayre*, 158 U. S. 109, 15 S. Ct. 773, 39 L. Ed. 914. Compare *Ex parte Crow Dog*, 109 U. S. 556, 3 S. Ct. 396, 27 L. Ed. 1030. If the jurisdiction of the Department of Labor may not be tested in the courts by means of the writ of habeas corpus, when the prisoner claims citizenship and makes a showing that his claim is not frivolous, then obviously deportation of a resident may follow upon a purely executive order, whatever his race or place of birth; for, where there is jurisdiction, a finding of fact by the executive department is conclusive (*United States v. Ju Toy*, 198 U. S. 253, 25 S. Ct. 644, 49 L. Ed. 1040), and courts have no power to interfere, unless there was either denial of a fair hearing (*Chin Yow v. United States*, 208 U. S. 8, 28 S. Ct. 201, 52 L. Ed. 369),

*States v. Charlie Dart* (D. C.) 251 F. 394. Compare *United States v. Jhu Why* (D. C.) 175 F. 630. In the following cases it was held that the burden of establishing American citizenship rested upon the Chinaman: *Yee King v. United States*, 179 F. 368, 102 C. C. A. 646; *Kum Sue v. United States*, 179 F. 370, 102 C. C. A. 648; *United States v. Too Toy* (D. C.) 185 F. 838; *Yee Ging v. United States* (D. C.) 190 F. 270; *Bak Kun v. United States*, 195 F. 53, 115 C. C. A. 55; *United States v. Hom Lim*, 223 F. 520, 139 C. C. A. 68; *Fong Ping Ngar v. United States*, 223 F. 523, 139 C. C. A. 71; *Ng You Nuey v. United States*, 224 F. 340, 140 C. C. A. 26; *Chin Ah Yoke v. White*, 244 F. 940, 157 C. C. A. 290; *Sit Sing Kum* (C. C. A.) 277 F. 191.—[*Note by judge.*]



or the finding was not supported by evidence (*American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 S. Ct. 33, 47 L. Ed. 90), or there was an application of an erroneous rule of law (*Gegiow v. Uhl*, 239 U. S. 3, 36 S. Ct. 2, 60 L. Ed. 114).

To deport one who so claims to be a citizen obviously deprives him of liberty, as was pointed out in *Chin Yow v. United States*, 208 U. S. 8, 13, 28 S. Ct. 201, 52 L. Ed. 369. It may result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court. Compare *United States v. Woo Jan*, 245 U. S. 552, 556, 38 S. Ct. 207, 62 L. Ed. 466; *White v. Chin Fong*, 253 U. S. 90, 93, 40 S. Ct. 449, 64 L. Ed. 797.

It follows that Gin Sang Get and Gin Sang Mo are entitled to a judicial determination of their claims that they are citizens of the United States; but it does not follow that they should be discharged. The practice indicated in *Chin Yow v. United States*, *supra*, and approved in *Kwock Jan Fat v. White*, 253 U. S. 454, 465, 40 S. Ct. 566, 64 L. Ed. 1010, should be pursued. Therefore, as to Gin Sang Get and Gin Sang Mo, the judgment of the Circuit Court of Appeals is reversed, and the cause remanded to the District Court, for trial in that court of the question of citizenship, and for further proceedings in conformity with this opinion. As to Ng Fung Ho and Ng Yuen Shew, the judgment of the Circuit Court of Appeals is affirmed.

Judgment affirmed in part and reversed in part.

Writ of habeas corpus to issue as to Gin Sang Get and Gin Sang Mo.<sup>7</sup>

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UNITED STATES *ex rel.* BILOKUMSKY *v.* TOD, Commissioner of Immigration at the Port of New York, et al.

Supreme Court of the United States, 1923. 263 U. S. 149, 44 S. Ct. 54, 68 L. Ed. 221.

Habeas corpus proceeding by the United States, on the relation of Michael Bilokumsky, against Robert E. Tod, Commissioner of Immigration at the Port of New York, and others. From a dismissal of the writ, relator appeals. Affirmed.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Bilokumsky is said to have entered the United States in 1912. In May, 1921, he was arrested in deportation proceedings upon a warrant of the Secretary of Labor as being an alien within the United States in violation of law. The specific ground was having in his possession

<sup>7</sup> As to the cases of Sing Tuck and Ju Toy, cited in the above opinion, see Annual Report of Commissioner General of Immigration 1904, p. 139; 1905, p. 86; also 1907, p. 106.

for the purpose of distribution printed matter which advocated the overthrow of the government of the United States by force or violence. Act Oct. 16, 1918, c. 186, §§ 1, 2, 40 Stat. 1012, as amended by Act June 5, 1920, c. 251, 41 Stat. 1008. After a hearing, granted to enable him to show cause why he should not be deported, a warrant of deportation issued. While in the custody of the Commissioner of Immigration at the Port of New York, he filed in the federal court his petition for a writ of habeas corpus. That court heard the case upon the return and a traverse thereto, dismissed the writ, remanded the relator to the custody of the Commissioner, allowed an appeal, and stayed deportation until further order. The case is here under section 238 of the Judicial Code (Comp. St. § 1215), the claim being that the relator was denied rights guaranteed by the Fourth and Fifth Amendments to the federal Constitution.

Prior to the application for the warrant of arrest in the deportation proceedings, Bilokumsky was confined to Moyamensing Prison, Philadelphia, on charges made by city authorities that he had violated the state sedition law. While there he was sworn and interrogated by an immigration inspector, who took a stenographic report of the examination. In answer to questions so put, he admitted that he was an alien, but denied that he had done anything which rendered him liable to deportation. There is nothing in the examination which suggests that Bilokumsky made his statement because of threats or promises of favor, and there was no evidence that the statement was an involuntary one, unless compulsion is to be inferred from the fact that he was at the time in custody, that city and federal authorities were then co-operating "with a view to ridding this country of undesirables," that the prosecution under the state law was dropped soon after the institution of the deportation proceedings, that he was not then represented by counsel, and that he was not apprised by the inspector, either that he was entitled to be so represented or that he was not obliged to answer.

At the hearing under the warrant of the Secretary of Labor all facts necessary to establish that Bilokumsky had in his possession for purpose of distribution printed matter which advocated the overthrow of the government were proved by evidence to which there was no objection. To prove alienage the inspector called Bilokumsky as a witness. He was sworn, but, when questioned by the immigration inspector, under advice of counsel, stood mute, refusing even to state his name. After his refusal to answer, the report of his examination in Moyamensing Prison was introduced, although duly objected to by counsel. He did not testify on his own behalf; nor did he, or his counsel, make the claim, at the hearing, that he is a citizen of the United States. The rules then in force dealing with the conduct of such hearings are copied in the margin.<sup>8</sup> So far as appears these were fully com-

<sup>8</sup> "Rule 22, subd. 5 (a). Upon receipt of a telegraphic or written warrant of arrest the alien shall be taken before the person or persons therein named or described and granted a hearing to enable him to show cause, if any there be,

plied with. It is conceded that, if the fact of alienage was legally established, there was both probable cause for issuing the original warrant of arrest and ample evidence at the hearing to justify a finding that relator was within the United States in violation of law. The contention is that there was no legal evidence of alienage.

If, in the deportation proceedings Bilokumsky had claimed that he was a citizen and had supported the claim by substantial evidence, he would have been entitled to have his status finally determined by a judicial, as distinguished from an executive, tribunal. *Ng Fung Ho v. White*, 259 U. S. 276, 281, 42 S. Ct. 492, 66 L. Ed. 938. But he made no such claim at that time; nor does he now contend, by allegation in his petition for habeas corpus, or otherwise, that he is a citizen of the United States. He rests his claim to relief on an entirely different ground. He asserts that, because of the manner in which the evidence of alienage was procured, the warrant of deportation is a nullity. He argues that alienage is essential to jurisdiction; that the government has the burden of establishing the fact; that it can be established only by legal evidence; that his examination while in prison is the only evidence introduced for that purpose; that its procurement involved both an unlawful search and seizure and a violation of the rules of the Department; that since it was illegally procured it was not legal evidence; and, hence, that the order is void. Its nullity is urged on three grounds. Because the order is unsupported by legal evidence; because the hearing was unfair; and because the original warrant issued without probable cause.

It is true that alienage is a jurisdictional fact; and that an order of deportation must be predicated upon a finding of that fact. *United States v. Sing Tuck*, 194 U. S. 161, 167, 24 S. Ct. 621, 48 L. Ed. 917. It is true that the burden of proving alienage rests upon the government. For the statutory provision which puts upon the person arrested in deportation proceedings the burden of establishing his right to remain in this country applies only to persons of the Chinese race and in other cases. See *Ng Fung Ho v. White*, *supra*, 259 U. S. 283, 42 S. Ct. 492, 66 L. Ed. 938. Compare Immigration Rules of May 1, 1917, rule 8. It is also true that, if the Department makes a finding of an essential fact which is unsupported by evidence, the court may intervene by the writ of habeas corpus. *Zakonaite v. Wolf*, 226 U. S. 272, 274, 275, 33 S. Ct. 31, 57 L. Ed. 218. But it is not true that, if the report of Bilokumsky's examination be eliminated there was no evidence of

why he should not be deported. If the alien is unable to speak or understand English, an interpreter should be employed where practicable.

"Rule 22, subd. 5 (b). At the beginning of the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued, and shall be apprised that he may be represented by counsel. The alien shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected he shall be permitted to be present during the conduct of the hearing."

Compare *Colyer v. Skeffington* (D. C.) 265 F. 17, 46.—[Note by judge.]



alienage at the hearing. Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character. *Runkle v. Burnham*, 153 U. S. 216, 225, 14 S. Ct. 837, 38 L. Ed. 694; *Kirby v. Tallmadge*, 160 U. S. 379, 383, 16 S. Ct. 349, 40 L. Ed. 463. Compare *Quock Ting v. United States*, 140 U. S. 417, 420, 11 S. Ct. 733, 851, 35 L. Ed. 501. Bilokumsky was present at the hearing, personally and by counsel. The ground for deportation involved a charge of acts which might have been made the basis of a serious criminal prosecution. Criminal Code, § 6 (Comp. St. §§ 10, 170). If Bilokumsky was a citizen, inquiry into the facts was immaterial; and the whole proceeding must have fallen. He, presumably, knew whether or not he was a citizen. Since alienage is not an element of the crime of sedition, testifying concerning his status could not have had a tendency to incriminate him. There was strong reason why he should have asserted citizenship, if there was any basis in fact for such a contention. Under these circumstances his failure to claim that he was a citizen and his refusal to testify on this subject had a tendency to prove that he was an alien.

Conduct is often capable of several interpretations; and caution should be exercised in drawing inferences from it. But there is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak. Deportation proceedings are civil in their nature. *Fong Yue Ting v. United States*, 149 U. S. 698, 730, 13 S. Ct. 1016, 37 L. Ed. 905; *Bugajewitz v. Adams*, 228 U. S. 585, 591, 33 S. Ct. 607, 57 L. Ed. 978. Neither statute nor rule requires that matter alleged in the warrant of arrest shall, in the absence of an express admission, be taken to be denied. A person arrested on the preliminary warrant is not protected by a presumption of citizenship comparable to the presumption of innocence in a criminal case. There is no provision which forbids drawing an adverse inference from the fact of standing mute. It is not unreasonable to assume that one who may wish to challenge the executive's jurisdiction in the courts will not refrain from asserting in the proceedings before the executive the facts on which he relies. To defeat deportation it is not always enough for the person arrested to stand mute at the hearing and put the government upon its proof. Compare *United States v. Sing Tuck*, 194 U. S. 161, 169, 24 S. Ct. 621, 48 L. Ed. 917. Since the proceeding was not a criminal one, Bilokumsky might have been compelled by legal process to testify whether or not he was an alien.<sup>9</sup> The government was not obliged to adopt that course.

<sup>9</sup> See *United States v. Hung Chang*, 134 F. 19, 67 C. C. A. 93; *Low Foon Yin v. United States*, 145 F. 791, 76 C. C. A. 355; *Law Chin Woon v. United States*, 147 F. 227, 77 C. C. A. 369; *Tom Wah v. United States*, 163 F. 1008, 90 C. C. A. 178; *In re Chan Foo Lin*, 243 F. 137, 140, 156 C. C. A. 3; *United States v. Brooks* (D. C.) 284 F. 908, 910. Act of Feb. 5, 1917, c. 29, § 16, 39 Stat. 874 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289½*i*).—[*Note by judge.*]



The introduction of Bilokumsky's examination as evidence did not render the hearing unfair. The specific grounds urged for holding it so are that the evidence was obtained by an illegal search and seizure and in violation of the rules of the Department. Both contentions are unfounded. It may be assumed that evidence obtained by the Department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings. Compare *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319; *Gouled v. United States*, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647. But mere interrogation under oath by a government official of one lawfully in confinement is not a search and seizure. It may be assumed that one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law.<sup>10</sup> But no rule is shown which prohibits interrogation without apprising the person under investigation that he is entitled to refuse to answer and to have counsel. The examination here complained of was conducted before there was an application for the warrant of arrest. There is neither in rule 22, subdivision 3, which relates to the application for a warrant,<sup>11</sup> nor elsewhere in the rules, any provision which deals with interrogation prior to the hearing. Rule 22, subdivision 5 (a) and (b), apply only to the proceedings after an arrest has been made. The careful provision which the rules make to ensure to the person arrested the benefit of counsel and access to the government's evidence at the hearing leads to the conclusion that the omission of any similar provision governing earlier stages in the proceeding was intentional. In the absence of a rule forbidding interrogation, or requiring the presence of counsel, mere examination in his absence does not render the hearing unfair. *Low Wah Suey v. Backus*, 225 U. S. 460, 470, 32 S. Ct. 734, 56 L. Ed. 1165.

It is urged that the admission of Bilokumsky's examination renders the hearing unfair because it is inconsistent with fundamental principles of justice embraced within the conception of due process of law. The argument is that if a judgment of deportation is to rest upon admissions attributable to the person to be deported, the admissions must have been made by him as a free agent and under circumstances which raise no doubt whether they were in fact made. Deportation is a process of such serious moment that on all controverted matters the executive officers should consider the evidence with close scrutiny. But here

<sup>10</sup> Compare *Whitfield v. Hanges*, 222 F. 745, 749, 138 C. C. A. 199; *Jouras v. Allen*, 222 F. 756, 758, 138 C. C. A. 210; *Mah Shee v. White*, 242 F. 868, 871, 155 C. C. A. 456; *Lum Hoy Kee v. Johnson* (D. C.) 281 F. 872; *Sibray v. United States* (C. C. A.) 282 F. 795, 797; *Ex parte Low Joe* (D. C.) 287 F. 545; *United States v. Dunton* (D. C.) 288 F. 959.—[*Note by judge.*]

<sup>11</sup> "Rule 22, subd. 3. *Application for Warrant of Arrest.*—The application must state facts showing *prima facie* that the alien comes within one or more of the classes subject to deportation after entry, and, except in cases in which the burden of proof is upon the alien (Chinese) involved, should be accompanied by some substantial supporting evidence."—[*Note by judge.*]

there was no denial of alienage; and a landing certificate was introduced by the government which, when connected with the statement in Bilokumsky's examination, tended in some respects to corroborate it. Moreover, the statement that one is an alien is not the confession of a crime. Except in case of Chinese or other Asiatics, alienage is a condition, not a cause, of deportation. So far as appears, there was nothing in the circumstances under which Bilokumsky was examined which would have rendered his answer inadmissible even in a criminal case. The mere fact that it was given while he was in confinement would not make it so.<sup>12</sup> And since deportation proceedings are in their nature civil, the rule excluding involuntary confessions could have no application. *Newhall v. Jenkins*, 2 Gray (Mass.) 562. Moreover, a hearing granted does not cease to be fair, merely because rules of evidence and of procedure applicable in judicial proceedings have not been strictly followed by the executive; or because some evidence has been improperly rejected or received.<sup>13</sup> *Tang Tun v. Edsell*, 223 U. S. 673, 681, 32 S. Ct. 359, 56 L. Ed. 606. To render a hearing unfair the defect, or the practice complained of, must have been such as might have led to a denial of justice, or there must have been absent one of the elements deemed essential to due process. *Chin Yow v. United States*, 208 U. S. 8, 28 S. Ct. 201, 52 L. Ed. 369. *Kwock Jan Fat v. White*, 253 U. S. 454, 459, 40 S. Ct. 566, 64 L. Ed. 1010. Compare *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91, 33 S. Ct. 185, 57 L. Ed. 431.

What has been said disposes also of the broader contention that the whole deportation proceeding was void ab initio, because without the report of Bilokumsky's examination there was lacking probable cause for issuance of the warrant of arrest. Irregularities on the part of the government official prior to, or in connection with, the arrest would not necessarily invalidate later proceedings in all respects conformable to law. "A writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment." *Nishimura Ekiu v. United States*, 142 U. S. 651, 662, 12 S. Ct. 336, 339

<sup>12</sup> *Hopt v. Utah*, 110 U. S. 574, 585, 4 S. Ct. 202, 28 L. Ed. 262; *Sparf v. United States*, 156 U. S. 51, 55, 715, 15 S. Ct. 273, 39 L. Ed. 343; *Pierce v. United States*, 160 U. S. 355, 357, 16 S. Ct. 321, 40 L. Ed. 454; *Wilson v. United States*, 162 U. S. 613, 623, 16 S. Ct. 895, 40 L. Ed. 1090; *Hardy v. United States*, 186 U. S. 224, 228-230, 22 S. Ct. 889, 46 L. Ed. 1137. Compare *Powers v. United States*, 223 U. S. 303, 32 S. Ct. 281, 56 L. Ed. 448.—[*Note by judge.*]

<sup>13</sup> Compare *United States v. Uhl*, 215 F. 573, 574, 576, 131 C. C. A. 641; *Choy Gum v. Backus*, 223 F. 487, 492-493, 139 C. C. A. 35; *Sibray v. United States*, 227 F. 1, 7, 141 C. C. A. 555; *United States v. Uhl* (C. C. A.) 266 F. 34, 39; *United States v. Uhl* (C. C. A.) 266 F. 646; *Morrell v. Baker* (C. C. A.) 270 F. 577; *United States v. Uhl* (C. C. A.) 271 F. 676, 677; *Chin Shee v. White* (C. C. A.) 273 F. 801, 805; *United States v. Wallis* (C. C. A.) 279 F. 401, 403; *Moy Yoke Shue v. Johnson* (D. C.) 290 F. 621.—[*Note by judge.*]

(35 L. Ed. 1146) *Iasigi v. Van de Carr*, 166 U. S. 391, 17 S. Ct. 595, 41 L. Ed. 1045; *Stallings v. Splain*, 253 U. S. 339, 343, 40 S. Ct. 537, 64 L. Ed. 940.  
Affirmed.

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## SECTION 57.—ADMINISTRATIVE FINALITY IN FAVOR OF THE PRIVATE RIGHT

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### NOBLE et al. v. UNION RIVER LOGGING R. CO.

Supreme Court of United States, 1893. 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123.

Appeal from the Supreme Court of the District of Columbia. Affirmed.

This was a bill in equity by the Union River Logging Railroad Company to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from executing a certain order revoking the approval of the plaintiff's maps for a right of way over the public lands, and also from molesting plaintiff in the enjoyment of such right of way secured to it under an act of Congress.

The bill averred, in substance, that the Union River Logging Railroad Company was organized March 20, 1883, under chapter 185 of the Territorial Code of Washington, authorizing the formation of "corporations for \* \* \* the purpose of building, equipping, and running railroads," etc. The articles declared the business and objects of the corporation to be "the building, equipping, running, maintaining, and operating of a railroad for the transportation of saw logs, piles, and other timber, and wood and lumber, and to charge and receive compensation and tolls therefor, \* \* \* from tide water in Lynch's Cove, at the head of Hood's Canal, in said Mason county, and running thence in a general northeasterly direction; by the most practicable route, a distance of about ten miles, more or less," etc. The capital stock of the company being subscribed, the company proceeded by degrees to construct and equip a road extending from tide water in Lynch's Cove, about four miles along the line above mentioned, to transport saw logs and other lumber and timber. On August 17, 1888, amended articles of incorporation were filed, "to construct and equip a railroad and telegraph line" over a much longer route, with branches, and "to maintain and operate said railroad and branches, and carry freight and passengers, thereon, and receive tolls therefor." Also "to engage and carry on a general logging business, and provide for the cutting, hauling, transportation, buying, owning, acquiring, and selling of all kinds of logs, piles, poles, lumber, and timber."

In the spring of 1889, plaintiff proceeded to extend its line of road for three miles beyond the point to which it had previously extended it. It located at intervals a better line of road; made and ballasted a new roadbed of standard gauge; and substituted steel rails and another locomotive in place of those rails and equipments which had been sufficient for its limited purposes, as specified in the original articles. In January, 1889, the company desiring to avail itself of Act Cong. March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), granting to railroads a right of way through the public lands of the United States, filed with the register of the land office at Seattle a copy of its articles of incorporation, a copy of the territorial law under which the company was organized, and the other documents required by the act, together with a map showing the termini of the road, its length, and its route through the public lands according to the public surveys. These papers were transmitted to the Commissioner of the Land Office, and by him to the Secretary of the Interior, by whom they were approved in writing, and ordered to be filed. They were accordingly filed at once, and the plaintiff notified thereof.

On June 13, 1890, a copy of an order by the appellant, successor in office to the Secretary of the Interior by whom the maps were approved, was served upon the plaintiff, requiring it to show cause why said approval should not be revoked and annulled.

This was followed by an order of the acting Secretary of the Interior, annulling and canceling such maps, and directing the Commissioner of the Land Office to carry out the order.

The answer admitted all the allegations of fact in the bill, and averred that it became known to the defendants that the plaintiff was not engaged in the business of a common carrier of passengers and freight at the time of its application, but in the transportation of logs for the private use and benefit of the several persons composing the said company, and that, being advised that a railroad company carrying on a merely private business was not such a railroad company as was contemplated by the act of Congress, deemed it their duty to vacate and annul the action of Mr. Vilas, then Secretary of the Interior, approving plaintiff's maps of definite location, and to that end caused the notice complained of in the bill to be served. They further claimed it to be their duty to revoke and annul the action of the former Secretary of the Interior as having been made improvidently, and on false suggestions, and without authority under the statute.

Upon a hearing upon the bill, answer, and accompanying exhibits, the court ordered a decree for the plaintiff, and an injunction as prayed for in the bill. Defendants appealed to this court.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

This case involves not only the power of this court to enjoin the head of a department, but the power of a Secretary of the Interior to annul the action of his predecessor, when such action operates to give effect to a grant of public lands to a railroad corporation.



1. With regard to the judicial power in cases of this kind, it was held by this court as early as 1803, in the great case of *Marbury v. Madison*, 1 Cranch, 137, that there was a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial; that, with respect to the former, there exists, and can exist, no power to control the executive discretion, however erroneous its exercise may seem to have been; but with respect to ministerial duties, an act or refusal to act is, or may become, the subject of review by the courts. The principle of this case was applied in *Kendall v. U. S.*, 12 Pet. 524, 9 L. Ed. 1181, and the action of the Circuit Court sustained in a proceeding where it had commanded the Postmaster General to credit the relator with a certain sum awarded to him by the Solicitor of the Treasury under an act of Congress authorizing the latter to adjust the claim, this being regarded as purely a ministerial duty. In *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 559, a mandamus was refused upon the same principle, to compel the Secretary of the Navy to allow to the widow of Commodore Decatur a certain pension and arrearages. Indeed, the reports of this court abound with authorities to the same effect. *Kendall v. Stokes*, 3 How. 87, 11 L. Ed. 506; *Brashear v. Mason*, 6 How. 92, 12 L. Ed. 357; *Reeside v. Walker*, 11 How. 272, 13 L. Ed. 693; *Commissioner v. Whiteley*, 4 Wall. 522, 18 L. Ed. 335; *U. S. v. Seaman*, 17 How. 231, 15 L. Ed. 226; *U. S. v. Guthrie*, 17 How. 284, 15 L. Ed. 102; *U. S. v. Commissioner*, 5 Wall. 563, 18 L. Ed. 892; *Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62; *Secretary v. McGarrahan*, 9 Wall. 298, 19 L. Ed. 579; *U. S. v. Schurz*, 102 U. S. 378, 26 L. Ed. 167; *Butterworth v. Hoe*, 112 U. S. 50, 5 Sup. Ct. 25, 28 L. Ed. 656; *U. S. v. Black*, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354. In all these cases the distinction between judicial and ministerial acts is commented upon and enforced.

We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. As observed by Mr. Justice Bradley in *Board v. McComb*, 92 U. S. 531, 541, 23 L. Ed. 623: "But it has been well settled that when a plain, official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other."

2. At the time the documents required by the act of 1875 were laid before Mr. Vilas, then Secretary of the Interior, it became his duty to examine them, and to determine, among other things, whether the railroad authorized by the articles of incorporation was such a one as was contemplated by the act of Congress. Upon being satisfied of this fact, and that all the other requirements of the act had been observed, he was authorized to approve the profile of the road, and to cause such approval to be noted upon the plats in the land office for the district where such land was located. When this was done, the granting section of the act became operative, and vested in the railroad company a right of way through the public lands to the extent of 100 feet on each side of the central line of the road. *Frasher v. O'Connor*, 115 U. S. 102, 5 Sup. Ct. 1141, 29 L. Ed. 311.

The position of the defendants in this connection is that the existence of a railroad, with the duties and liabilities of a common carrier of freight and passengers, was a jurisdictional fact, without which the Secretary had no power to act, and that in this case he was imposed upon by the fraudulent representations of the plaintiff, and that it was competent for his successor to revoke the approval thus obtained; in other words, that the proceedings were a nullity, and that his want of jurisdiction to approve the map may be set up as a defense to this suit.

It is true that, in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example, as the service of process within the state upon the defendant in a common-law action (*D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648; *Webster v. Reid*, 11 How. 437, 13 L. Ed. 761; *Harris v. Hardeman*, 14 How. 334, 14 L. Ed. 444; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Borden v. Fitch*, 15 Johns. [N. Y.] 141, 8 Am. Dec. 225); the seizure and possession of the res within the bailiwick in a proceeding in rem (*Rose v. Himely*, 4 Cranch, 241, 2 L. Ed. 608; *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897); a publication in strict accordance with the statute, where the property of an absent defendant is sought to be charged (*Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959; *Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 11 Sup. Ct. 512, 35 L. Ed. 116). So, if the court appoint an administrator of the estate of a living person, or, in a case where there is an executor capable of acting (*Griffith v. Frazier*, 8 Cranch, 9, 3 L. Ed. 471), or condemns as lawful prize a vessel that was never captured (*Rose v. Himely*, 4 Cranch, 241, 269, 2 L. Ed. 608), or a court-martial proceeds and sentences a person not in the military or naval service (*Wise v. Withers*, 3 Cranch, 331, 2 L. Ed. 457), or the land department issues a patent for land which has already been reserved or granted to another person the act is not voidable merely, but void. In these and similar cases the action of the court or officer

fails for want of jurisdiction over the person or subject-matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.

There is, however, another class of facts which are termed "quasi jurisdictional," which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged, and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts, the finding of the court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a federal court, which, when found by such court, cannot be questioned collaterally (*Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552, 8 Sup. Ct. 217, 31 L. Ed. 202; *In re Sawyer*, 124 U. S. 200, 220, 8 Sup. Ct. 482, 31 L. Ed. 402); the existence and amount of the debt of a petitioning debtor in an involuntary bankruptcy (*Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520; *Betts v. Bagley*, 12 Pick. [Mass.] 572); the fact that there is insufficient personal property to pay the debts of a decedent, when application is made to sell his real estate (*Comstock v. Crawford*, 3 Wall. 396, 7 L. Ed. 189; *Grignon's Lessee v. Astor*, 2 How. 319, 11 L. Ed. 283; *Florentine v. Barton*, 2 Wall. 210, 17 L. Ed. 783); the fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors (*Thompson v. Tolmie*, 2 Pet. 157); and others of a kindred nature, where the want of jurisdiction does not go to the subject-matter or the parties, but to a preliminary fact necessary to be proven to authorize the court to act. Other cases of this description are: *Hudson v. Guestier*, 6 Cranch, 281, 3 L. Ed. 224; *Ex parte Watkins*, 3 Pet. 193, 7 L. Ed. 650; *U. S. v. De la Maza Arredondo*, 6 Pet. 691, 709, 8 L. Ed. 547; *Dyckman v. City of New York*, 5 N. Y. 434; *Jackson v. Crawfords*, 12 Wend. (N. Y.) 533; *Jackson v. Robinson*, 4 Wend. (N. Y.) 436; *Fisher v. Bassett*, 9 Leigh (Va.) 119, 131, 33 Am. Dec. 227; *Wright v. Douglass*, 10 Barb. (N. Y.) 97, 111. In this class of cases, if the allegation be properly made, and the jurisdiction be found by the court, such finding is conclusive and binding in every collateral proceeding; and, even if the court be imposed upon by false testimony, its finding can only be impeached in a proceeding instituted directly for that purpose. *Simms v. Slacum*, 3 Cranch, 300, 2 L. Ed. 446.

This distinction has been taken in a large number of cases in this court, in which the validity of land patents has been attacked collaterally, and it has always been held that the existence of lands subject to be patented was the only necessary prerequisite to a valid patent. In the one class of cases it is held that, if the land attempted to be patented had been reserved, or was at the time no part of the public domain, the land department had no jurisdiction over it, and no pow-

er or authority to dispose of it. In such cases its action in certifying the lands under a railroad grant, or in issuing a patent, is not merely irregular, but absolutely void, and may be shown to be so in any collateral proceeding. *Polk's Lessee v. Wendal*, 9 Cranch, 87, 3 L. Ed. 665; *Patterson v. Winn*, 11 Wheat. 380, 6 L. Ed. 500; *Jackson v. Lawton*, 10 Johns. (N. Y.) 23, 6 Am. Dec. 311; *Minter v. Crommelin*, 18 How. 87, 15 L. Ed. 279; *Reichart v. Felps*, 6 Wall. 160, 18 L. Ed. 849; *Railway Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122; *U. S. v. Southern Pac. Ry. Co.*, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091.

Upon the other hand, if the patent be for lands which the land department had authority to convey, but it was imposed upon, or was induced by false representations to issue a patent, the finding of the department upon such facts cannot be collaterally impeached, and the patent can only be avoided by proceedings taken for that purpose. As was said in *Smelting, etc., Co. v. Kemp*, 104 U. S. 636, 640, 26 L. Ed. 875: "In that respect they [the officers of the land department] exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable, except by a direct proceeding for its correction or annulment." In *French v. Fyan*, 93 U. S. 169, 23 L. Ed. 812, it was held that the action of the Secretary of the Interior identifying swamp lands, making lists thereof, and issuing patents therefor, could not be impeached in an action at law by showing that the lands which the patent conveyed were not in fact swamp and overflowed lands, although his jurisdiction extended only to lands of that class. Other illustrations of this principle are found in *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *Steel v. Smelting, etc., Co.*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800; *Vance v. Burbank*, 101 U. S. 514, 25 L. Ed. 929; *Hoofnagle v. Anderson*, 7 Wheat. 212, 5 L. Ed. 437; *Ehrhardt v. Hogaboom*, 115 U. S. 67, 5 Sup. Ct. 1157, 29 L. Ed. 346.

In *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848, it was said directly that it is a part of the daily business of officers of the land department to decide when a party has by purchase, by pre-emption, or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the Secretary of the Interior, if taken in time; "but, if no such appeal be taken, and the patent, issued under the seal of the United States and signed by the President, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all the authority or control of the executive department over the land, and over the title which it



has conveyed. \* \* \* The functions of that department necessarily cease when the title has passed from the government."

We think the case under consideration falls within this latter class. The lands over which the right of way was granted were public lands, subject to the operation of the statute; and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and, when decided, and his approval was noted upon the plats, the first section of the act vested the right of way in the railroad company. The language of that section is "that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory," etc. The uniform rule of this court has been that such an act was a grant in *præsenti* of lands to be thereafter identified. *Railway Co. v. Alling*, 99 U. S. 463, 25 L. Ed. 438. The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose.

If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained. *Moffat v. U. S.*, 112 U. S. 24, 5 Sup. Ct. 10, 28 L. Ed. 623; *U. S. v. Minor*, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110. A revocation of the approval of the Secretary of the Interior, however, by his successor in office, was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void. As was said by Mr. Justice Grier in *U. S. v. Stone*, 2 Wall. 525, 535, 17 L. Ed. 765: "One officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court." *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848.

The case of *U. S. v. Schurz*, 102 U. S. 378, 26 L. Ed. 167, is full authority for the position assumed by the plaintiff in the case at bar. In this case the relator had been adjudged to be entitled to 160 acres of the public lands; the patent had been regularly signed, sealed, countersigned, and recorded; and it was held that a mandamus to the Secretary of the Interior to deliver the patent to the relator should be granted. It was said in this case by Mr. Justice Miller: "Whenever this takes place [that is, when a patent is duly executed], the land has ceased to be the land of the government, or, to speak in technical language, title has passed from the government, and the power of these officers to deal with it has also passed away."<sup>14</sup>

It was not competent for the Secretary of the Interior thus to revoke the action of his predecessor, and the decree of the court below must therefore be affirmed.

<sup>14</sup> In the same case (*United States v. Schurz*, 102 U. S. 378, 401, 402, 26 L. Ed. 167 [1880]), the court says: "The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may

## UNITED STATES v. MINOR.

Supreme Court of the United States, 1885. 114 U. S. 233, 5 S. Ct. 836, 29 L. Ed. 110.

Appeal from the Circuit Court of the United States for the District of California.

This is an appeal from a decree of the Circuit Court for the District of California, dismissing the bill of the United States on demurrer. The object of the bill was to set aside and annul a patent issued by the United States to Minor, on January 5, 1876, for the N. W.  $\frac{1}{4}$  of section 18, township 6 N., range 2 E. of the Humboldt meridian. The bill as originally filed made, in substance, the following allegations:

That said Minor, on the twenty-third day of October, 1874, filed the declaratory statement in the land office necessary to give him a right of pre-emption to the land, alleging that he had made a settlement on it March 20 of that year; and on June 20, 1875, he made the usual affidavit that he had so settled on the land in March of the previous year; that he had improved it, built a house on it, and continued to reside on it from the time of said settlement, and had cultivated about one acre of it. He also made affidavit, as the law required, that he had not so settled upon and improved the land with any agreement or contract with any person by which the title he might acquire would inure to the benefit of the latter. He also made oath that he was not the owner of 320 acres of land in any state or territory in the United States. These affidavits being received by the register and receiver as true, he paid the money necessary to perfect his right, received of them the usual certificate, called a patent certificate, on which there was issued to him at the General Land Office in due time the patent which is now assailed.

The bill then charges that all these statements, made under oath before the land officers, were false and fraudulent; that defendant had never made the settlement nor cultivation nor improvements mentioned; that he had never resided on the land, but during all the time had lived and had his home in a village about 12 miles distant; and that he had not made these proofs of settlement to appropriate the

be voidable, but not absolutely void. The mode of avoiding it, if voidable, is not by arbitrarily withholding it, but by judicial proceedings to set it aside, or correct it if only partly wrong."

In *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485 (1871), equitable relief was given where an error of law had been committed in issuing a land patent. As to mode of relief in such cases, see *Silver v. Ladd*, 7 Wall. 219, 228, 19 L. Ed. 133 (1868).

As to administrative rescission of adverse action, in favor of the individual, see *Beley v. Naphtaly*, 169 U. S. 353, 18 S. Ct. 354, 42 L. Ed. 775 (1898). In favor of one individual as against another in case of Indian lands, while property is still under administrative control, see *Lane v. United States ex rel. Mickadiet*, 241 U. S. 201, 36 S. Ct. 599, 60 L. Ed. 956 (1916).

land to his own use, but with intent to sell the same to some person unknown to the plaintiff. It is also charged that defendant produced, in corroboration of his own statement, the affidavit of a witness, one Joseph Ohuitt, who testified to the settlement, improvement, and residence of defendant, all of which was false and fraudulent. It is then alleged that by these false affidavits the land officers, supposing them to be true, were deceived and misled into allowing said pre-emption claim and issuing said patent, to the great injury of the United States.

\* \* \*

The circuit and district judges have certified a division of opinion on eight propositions of law, which they believe to arise out of this demurrer, as follows: (1) Whether the frauds and perjury alleged in the bill as the equitable grounds for vacating the patent in question are frauds extrinsic and collateral to the matter tried and determined in the land office upon which the patent issued, and constitute such frauds as entitle the complainant to relief in a court of equity. (2) Whether perjury and false testimony in a proceeding before the land office, such as alleged in the said amended bill, by means of which a patent to a portion of the public land is fraudulently and wrongfully secured, is such a fraud as will require a court of equity to vacate the patent on that ground alone. (3) Whether the decision and determination of the questions involved on false and perjured testimony, as set forth in the said amended bill, and the issue of a patent thereon, are not conclusive as against the United States on a bill filed to vacate the patent so issued. \* \* \*

MILLER, J. \* \* \* The first three questions may be considered together. If an individual or a corporation had been induced to part with the title to land, or any other property, by such a fraud as that set out in this bill, there would seem to be no difficulty in recovering it back by appropriate judicial proceedings. If it was a sale and conveyance of land induced by fraudulent misrepresentation of facts which had no existence, on which the grantor relied, and had a right to rely, and which were essential elements of the consideration, there would be no hesitation in a court of equity giving relief; and where the title remained in the possession of the fraudulent grantee, the court would surely annul the whole transaction, and require a reconveyance of the land to the grantor. The case presented to us by the bill is one of unmitigated fraud and imposition, consummated by means of representations on which alone the sale was made, every one of which was false. The law and the rules governing these pre-emption sales required in every instance the settlement and residence for a given time on the land, the actual cultivation of a part of it, and building a house on it. It required that the claimant should do this with a purpose of acquiring real ownership for himself and not for another, nor with a purpose to sell to another.

In the case as presented by this bill none of these things were done, though the land officers were made to believe they were done by the

false representation of the defendant. It was a case where all the requirements of the law were set at naught, evaded, and defied by one stupendous falsehood, which included all the requirements on which the right to secure the land rested. There can be no question of the fraud, and its misleading effect on the officers of the government, and, in a transaction between individuals, it makes a clear case for relief.

Is there anything in the circumstance that these misrepresentations were supported by perjury, that the defendant made oath to his falsehoods, and procured a false affidavit of a witness to corroborate himself, which should deprive the injured party of relief? It would seem rather to add to the force of the reasons for such relief that fraud and falsehood were re-enforced by perjury.

Is there any reason to be found in the relation of the government to such a case as this, which will deprive it of the same right to relief as an individual would have? On the contrary, there are reasons why the government in this class of cases should not be held to the same diligence in guarding against fraud as a private owner of real estate. The government owns millions and millions of acres of land, which are by law open to pre-emption, homestead, and public and private sale. The right and the title to these lands are to be obtained from the government only in accordance with fixed rules of law. For the more convenient management of the sale of these lands, and the establishment by individuals of the inchoate rights of pre-emption and homestead, and their final perfection in the issuing of a title called a patent, there is established in each land district an office in which are two officers, and no more, called register and receiver. These districts often include 20,000 square miles or more, in all parts of which the lands of the government subject to sale, pre-emption, and homestead are found. These officers do not, they cannot, visit these lands. They have maps showing the location of the government lands, and their subdivision into townships, sections, and parts of sections, and when a person desires to initiate a claim to any of them, he goes before them and makes the necessary statements, affidavits, and claims, of all which they make memoranda and copies, which are forwarded to the General Land Office at Washington.

For the truth of these statements they are compelled to rely on the oaths of the parties asserting claims, and such ex parte affidavits as they may produce. In nine cases out of ten, perhaps in a much larger percentage, the proceedings are wholly ex parte. In the absence of any contesting claimant for a right to purchase or secure the land, the party applying has it all his own way. He makes his own statement, sworn to before those officers, and he produces affidavits. If these affidavits meet the requirements of the law, the claimant succeeds, and what is required is so well known that it is reduced to a formula. It is not possible for the officers of the government, except in a few rare instances, to know anything of the truth or falsehood of these



statements. In the cases where there is no contesting claimant there is no adversary proceeding whatever. The United States is passive; it opposes no resistance to the establishment of the claim, and makes no issue on the statement of the claimant.

When, therefore, he succeeds by misrepresentation, by fraudulent practices, aided by perjury, there would seem to be more reason why the United States, as the owner of land of which it has been defrauded by these means, should have remedy against that fraud—all the remedy which the courts can give—than in the case of a private owner of a few acres of land on whom a like fraud has been practiced.

In a suit brought by Moffat against the United States to set aside a patent for land on the ground of fraud in procuring its issue, this court said: "It may be admitted, as stated by counsel, that if, upon any state of facts, the patent might have been lawfully issued, the court will presume, as against collateral attack, that the facts existed; but that presumption has no place in a suit by the United States directly assailing the patent and seeking its cancellation for fraud in the conduct of those officers." 112 U. S. 24, 5 Sup. Ct. 10, 28 L. Ed. 623. The principle is equally applicable when those officers, though wholly innocent, were imposed upon and deceived by the fraud and false swearing of the party to whom the patent was issued.

The learned judge whose opinion prevailed in the Circuit Court and is found in the record, has been misled by confounding the present case with that of *U. S. v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, and *Vance v. Burbank*, 101 U. S. 514, 25 L. Ed. 929, and thus applying principles to this which do not belong to it. In *Throckmorton's Case*, it is true, a part of the relief sought was to set aside a patent for land issued by the United States. But the patent was issued on the confirmation of a Mexican grant after proceedings prescribed by the act of Congress on that subject. These proceedings were judicial. They commenced before a board of commissioners. There were pleadings and parties, and the claimant was plaintiff, and the United States was the defendant. Both parties were represented by counsel—the United States having in all such cases her regular district attorney to represent her. Witnesses were examined in the usual way, by depositions, subject to cross-examinations, and not by *ex parte*-affidavits. From this tribunal there was a right of appeal to the district court, and from that court to the Supreme Court of the United States, by either party. There was nothing wanting to make such a proceeding, in the highest sense, a judicial one, and to give to its final judgment or decree all the respect, the verity, the conclusiveness, which belong to such a final decree between the parties. The patent could only issue on this final decree of confirmation of the Spanish or Mexican grant, and was, in effect, but the execution of that decree.

It was to such a case as this that the ruling in *Throckmorton's Case* was applied. The court said in that case, which was a bill to set aside the decree of confirmation: "The genuineness and validity of the con-

cession from Michelterona, produced by complainant, was the single question pending before the board of commissioners and the district court for four years. It was the thing, and the only thing, that was controverted, and it was essential to the decree. To overrule the demurrer to this bill would be to retry, twenty years after the decision of those tribunals, the very matter which they tried, on the ground of fraud in the document on which the decree was made. If we can do this now, some other court may be called on twenty years hence to retry the same matter on another allegation of fraudulent combination in this suit to defeat the ends of justice; and so the number of suits would be without limit and litigation endless about the single question of the validity of this document."

It needs no other remarks than those we have already made, as to the nature of the proceeding before the land officers, to show how inappropriate this language is to such a proceeding. Here no one question was in issue. No issue at all was taken. No adversary proceeding was had. No contest was made. The officers, acting on such evidence as the claimant presented, were bound by it and by the law to issue a patent. They had no means of controverting its truth, and the government had no attorney to inquire into it. Surely the doctrine applicable to the conclusive character of the solemn judgments of courts, with full jurisdiction over the parties and the subject-matter, made after appearance, pleadings, and contest by parties on both sides, cannot be properly applied to the proceedings in the land office in such cases.

So, also, as regards the case of *Vance v. Burbank*, 101 U. S. 514, 25 L. Ed. 929, the language of the court in regard to the conclusiveness of the decision of the land office must be considered with reference to the case before it. That was not a case by the grantor, the United States, to set aside the patent, but by a party, or the heirs of a party, who had contested the right of the grantee before all the officers of the land department up to the Secretary of the Interior, and been defeated, and where the whole question depended on disputed facts, the evidence of which was submitted by the contestants to those officers. In such a case, where there was full hearing, rehearing, and issues made and tried, the observation of the court, "that the decision of the proper officers of the department is in the nature of a judicial determination of the matter in dispute," is well founded.

It has been often said by this court that the land officers are a special tribunal of a quasi judicial character, and their decision on the facts before them is conclusive. And we are not now controverting the principle that where a contest between individuals, for the right to a patent for public lands, has been brought before these officers, and both parties have been represented and had a fair hearing, that those parties are concluded as to all the facts thus in issue by the decision of the officers. But in proceedings like the present, wholly *ex parte*, no contest, no adversary proceedings, no reason to suspect fraud, but where

the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title, and it would be going quite too far to say that it cannot be assailed by a proceeding in equity and set aside as void, if the fraud is proved and there are no innocent holders for value. We have steadily held that, though in the absence of fraud the facts were concluded by the action of the land department, a misconstruction of the law, by which alone the successful party obtained a patent, might be corrected in equity; much more when there was fraud and imposition.

If, by the case as made by the bill, Spence's claim had covered all the land patented to Minor, it would present the question whether the United States could bring this suit for Spence's benefit. The government, in that case, would certainly have no interest in the land when recovered, as it must go to Spence without any further compensation. And it may become a grave question, in some future case of this character, how far the officers of the government can be permitted, when it has no interest in the property or in the subject of the litigation, to use its name to set aside its own patent, for which it has received full compensation, for the benefit of a rival claimant. The question, however, does not arise here, for half the land covered by the patent would revert to the United States if it was vacated; and, as between the United States and Minor it was one transaction evidenced by one muniment of title, the question does not arise; certainly not on demurrer to this bill.

The result of these considerations is that the first and second questions are answered in the affirmative; the third, fourth, sixth, and seventh in the negative; and the fifth is immaterial.

The decree of the Circuit Court is reversed, and the case remanded for further proceeding not inconsistent with this opinion.<sup>15</sup>

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### UNITED STATES v. VITELLI & SON.

Court of Customs Appeals, 1914. 5 Ct. Cust. App. 151.

BARBER, Judge, delivered the opinion of the court.

In 1905, 1906 and 1907, 14 separate entries were made by the importers of chestnuts and garlic. Liquidation was had by the collector and the duties imposed paid. On July 8, 1912, an order was made by the collector stating that satisfactory evidence having been produced showing that the returns of weights on the importations in question were false and fraudulent, the liquidations were declared void and a re-liquidation directed on the basis of the corrected returns made by the United States weigher. The reliquidation was had and protest was filed with the collector and an appeal taken to the Board of General

<sup>15</sup> Suit to cancel certificate of naturalization. *U. S. v. Norsch* (C. C.) 42 F. 417 (1890).

Appraisers, which sustained the protest on the ground that in the hearing had before the board the government had not supported the claim of fraud by proof, and that it was incumbent upon the collector to establish this fraud by competent evidence, and that a presumption of fraud could not arise from the official action of the collector in reliquidating the entries. From this decision the government took an appeal to this court.

Subsequently to the hearing a brief has been filed by permission of counsel intervening amici curiæ, and the contention is made in this brief that while the Board of General Appraisers reached the correct conclusion, it was in error in assuming that the collector, in reliquidating after the lapse of a year, acted in the discharge of a right granted or duty imposed by law, and that no reliquidation can be had after the lapse of one year.

The board construed section 21 of the act of 1874 as authorizing a reliquidation at any time during one year from the time of entry, and as also authorizing a reliquidation after the lapse of one year in case of fraud or in case of a pending protest. This section provides:

"That whenever \* \* \* duties upon any imported goods, wares, and merchandise shall have been liquidated and paid, and such goods, wares, and merchandise shall have been delivered to the owner, \* \* \* such entry and passage free of duty and such settlement of duty shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties."

This section is to be construed in connection with subsection 14 of the Act of August 5, 1909, which provides:

"That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges and exactions other than duties shall, within 15 days after but not before such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within 15 days after the payment of such fees, charges, and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. \* \* \*"

This section was enacted in lieu of section 2931 of the Revised Statutes, which, as it relates to the question here involved, was in substantially the same terms. That section provided that—

"On the entry of any \* \* \* merchandise, the decision of the collector of customs at the port of importation and entry, as to the



rate and amount of duties to be paid \* \* \* on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner \* \* \* importer, consignee, or agent of the merchandise \* \* \* shall, within 10 days after the ascertainment and liquidation of the duties by the proper officers of the customs \* \* \* give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within 30 days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury."

These two provisions were first considered by the courts in 1879, and in an opinion by Blatchford, Circuit Judge, in *United States v. Phelps et al.*, 17 Blatch. 321, Fed. Cas. No. 16039, it was said:

"By section 2931 of the Revised Statutes the decision of the collector, in liquidating duties, as to the amount of duties on imported goods, is made final and conclusive against all persons interested in such goods, unless notice in writing of dissatisfaction with such decision is given to the collector, by the importer, within 10 days after the liquidation, and unless within 30 days after the liquidation there is an appeal by the importer from the liquidation to the Secretary of the Treasury. Such liquidation is not made final and conclusive as against the United States. There is nothing in the section which forbids a reliquidation or a new decision by the collector, even after the payment of all the duties fixed by a proper liquidation, or even after the refunding of money deposited beyond the amount of duties so fixed; or which forbids a new decision by the collector as to the law on the same facts, or a new decision as to facts, based on additional or new or different facts. This view is confirmed by the enactment of section 21 of the Act of June 22, 1874 (18 Stat. 190), which is as follows:

"'Whenever any goods, wares, and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares, and merchandise shall have been delivered to the owner, importer, agent or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties.'

"This provision was in force when the transactions in this case took place. It applies to the United States. The expression 'all parties' includes the United States. By section 2931 of the Revised Statutes, there was no limitation imposed on the power of the collector to reliquidate, when such reliquidation was in the interest of the government. But by section 21 of the act of 1874 a limitation is imposed on such power, so that, after the entry of goods, and after the liquidation and payment of duties on them, and after the delivery of the goods to the importer, such settlement of duties, if there be no fraud and no protest by the importer, is, after one year from the entry, final and con-

clusive, even as respects the government. In the present case, the suit was brought before the one year expired. The collector, therefore, had power to make the reliquidation of July 20, 1878. \* \* \*

This case has not only been frequently followed, but the paragraph providing as to cases in which the first liquidation of the collector shall be final has been twice re-enacted and is now embodied in subsection 14, above quoted.

The cases which recognize and follow the case of *United States v. Phelps* are some of them referred to in *Hawley & Letzerich v. United States*, 3 Ct. Cust. App. 456; T. D. 33037, and are collected in the case of *In re Forbes & Wallace*, T. D. 23655, there cited. See, also, *Louisville Pillow Co. v. United States* (C. C. A.) 144 F. 386, and *United States v. Mexican International R. Co.* (C. C. A.) 151 F. 545.

The effect of these decisions, and particularly in view of the re-enactment of the provisions now embodied in subsection 14, is to establish the rule that the first liquidation of the collector is not conclusive upon the United States; that in the absence of limitation a reliquidation may be had at any time; and that the only limitation is contained in section 21 of the Act of June 22, 1874, which by implication also recognizes the right to reliquidate after the first liquidation is had.

The cases in which the question had arisen were cases in which the liquidation occurred within the one year's period fixed by the statute of 1874. But it is obvious that the power to reliquidate is precisely the same in any one of the three instances mentioned in that section. The limitation is that reliquidation shall not occur after the expiration of one year from the time of entry, in the absence of fraud, and in the absence of protest by the owner, importer, agent, or consignee. So if a reliquidation may be had at any time within one year, by the same authority if fraud exists or if a protest is had, a reliquidation may take place after the year. Or to state it in another way, there is no limitation fixed by section 21 except a limitation which arises only in the absence of fraud and in the absence of protest. So far as section 21 contains an implied authority for reliquidation, it is equally as forceful in importing the right to reliquidate in case of fraud and in the case of protest after the lapse of one year as it is in importing the right to so reliquidate within the period of one year.

This brings us then to a consideration of the question whether when a reliquidation is had after one year it is incumbent upon the Government in case of an appeal to establish that there was in fact fraud before a reliquidation can be justified. That the right to recover these duties against imported merchandise vested in the Government upon the importation is too well settled to require extended discussion. Upon this point see the cases cited, *supra*. And that the power of the collector to reliquidate existed prior to the Act of June 22, 1874, is determined by cases cited. See particularly *United States v. Calhoun* (D. C.) 184 F. 501.

In this case the collector reports that—

Evidence was produced to show that the returns of the United States weighers were false and fraudulent, hence the liquidations were declared void and reliquidations were made on the true weights, as found on the amended returns of the United States weigher.

The briefs of the importers and amici curiæ concede that if the collector proceeded within the authority conferred upon him by statute his acts carry with them the presumption of correctness, but they urge that the collector has no authority to find that fraud exists before he can reliquidate, and hence when his reliquidation is challenged by protest, as in this case, that it is incumbent upon the government at the hearing before the board to go ahead and establish the existence of the fraud. In other words, they treat the case much as if the appeal here were an appeal from the finding of fraud rather than the reliquidation. Upon this theory, however, until fraud were established it is manifest there could be no reliquidation whatever, because if the collector is without power to find fraud he can in no case reliquidate on that ground, unless and until it is otherwise found, for which procedure the statute expressly or impliedly makes no provision. In this view there is really no reliquidation here to be challenged by protest.

The conduct of the importers, however, negatives this theory, because they have paid the reliquidated duties under protest, thereby taking the position that there has been a reliquidation, and are now prosecuting a protest for the purpose of having the same set aside and the moneys refunded.

We think it can not be said that this differs from other cases of an appeal from a liquidation of the collector in this respect. The very authority to liquidate, which resides in the collector alone, implies an authority to ascertain certain facts—for instance, to determine whether the goods were imported, whether entitled to free entry or dutiable, each of which as well as other findings are necessarily implied in the liquidating act and all of which, if protested against, may be challenged upon the hearing of the protest. The entire subject-matter of reliquidation is within his jurisdiction, and the power to determine the existence of the facts necessary to warrant the same inheres in him. Whether he will reliquidate or not is a matter in which he must exercise his discretion. It will not be presumed that he will without investigation wantonly and without cause exercise the power, but it will be presumed, when the same has been exercised, that it was warranted, and unless appeal is given from such decision, as it is in this case, such action is conclusive and by the statute is made so unless appealed from.

That this may involve the proving of a negative on the part of the importers does not affect the question, for in *Arthur v. Unkart*, 96 U. S. 118, 24 L. Ed. 768, a leading authority upon the proposition that the acts of public officers acting within the scope of their authority are presumed to be correct, it is clearly recognized and cases are cited to

the proposition that the support of a negative allegation often devolves upon parties who challenge the correctness of such official action.

It must always be kept in mind that in this case the statute makes no provision for the finding by any tribunal other than the collector of the existence of facts which warrant his action, and that in this case he has not, as is ingeniously argued, simply claimed or asserted that fraud exists, but, on the other hand, he has, as he must have done, found the existence of fraud. The position taken by both importers and amici curiæ here, if adopted, really results in a judicial annihilation of the settled doctrine of the law that the acts of officers of the law upon a subject of which they have jurisdiction are presumed to be correct.

This case is not the institution of a suit by the importers in a court of common-law jurisdiction, but is a special proceeding authorized by statute for the purpose of challenging the correctness of a decision of the collector, which decision is declared final unless appealed from. The importers have no constitutional right to review this decision in the courts. The right to do so is a favor granted to them by the United States.

As was said in the case of *Arnson v. Murphy*, 115 U. S. 579, 584, 6 S. Ct. 185, 188 (29 L. Ed. 491):

"The right of action does not exist independently of the statute, but is conferred by it. \* \* \* But the statute sets out with declaring that the decision of the collector shall be final and conclusive against all persons interested unless certain things are done. The mere exaction of the duties is, necessarily, the decision of the collector, and on this being shown in any suit it stands as conclusive till the plaintiff shows the proper steps to avoid it."

But, if it be assumed that the ordinary rules of pleading observed in civil causes may be invoked here, it should be noted that the statute, section 21, *supra*, excepts from the operation of its limiting provisions the following cases: First, where the year has not elapsed from the payment of the original liquidated duties and the delivery of the merchandise; second, where there is fraud; and third, where protest has been made. In other words, in the presence of any one of these conditions the bar of the statute does not apply, and their nonexistence is necessary to permit the liquidation to be final and conclusive upon all parties.

To obtain the benefit of the provision for finality of the first liquidation, in such a statute, it seems that any person who seeks to impeach a reliquidation must aver and prove the nonexistence of the statutory exceptions. This rule is fully set forth and discussed in *Lewis' Sutherland Statutory Construction*, vol. 2, § 351. See, also, *Arnson v. Murphy*, *supra*.

The importers here evidently recognized its applicability because their protest expressly denies the existence of fraud.



The question may be somewhat novel, as it is unusual to require one to prove the absence of fraud which may be imputed to him. The existence of fraud, however, is only incidental to the question as to the correctness of the reliquidation, and upon that issue the importers meet and must overcome the presumption that it is correct. Tested by the rule of pleading above mentioned the importers have failed to bring themselves within the same by failing to prove their averment that there was no fraud.

There is also another view of the case not discussed by counsel which ought not to be disregarded or overlooked. The original and amended weigher's returns are a part of the files, were before the board, and are before this court. These amended returns and the reliquidation thereon relate only to garlic and chestnuts, while some of the entries, 14 in number, cover in addition other merchandise. Upon these corrected weigher's returns are written statements to the effect that the greater part of the reliquidated merchandise had been traced from the importers to various persons who had weighed the same and kept a record of such weights, with which the weights shown in the corrected returns substantially correspond; that in some instances the merchandise had been paid for upon the basis of such weights; and that in at least one case the importers had billed the goods at 46,253 pounds, which was some 3,500 pounds greater than the weight thereof as originally returned by the weigher. We have examined some of the files relating to all these 14 entries, and therefrom it appears that the corrected returns increase the weights above those originally returned in amounts varying from 1,000 to 16,000 pounds in each of such entries.

We doubt if it can be said that these facts are not evidence of fraud, which, unexplained, would seem to import a deliberate and, for a time at least, successful attempt to pass many thousand pounds of merchandise through the customs without paying duty thereon. While it has been, as we understand, uniformly held that the weigher's return is conclusive upon the collector and the Board of General Appraisers where he has acted within the rules of law prescribing his duties, yet if he has fraudulently underweighed merchandise he has not so acted, but has violated not only the law but his statutory oath of office, and his weighing becomes a nullity. For an authority reviewing decisions on this subject see G. A. 6620 (T. D. 28249). It is also there held that where the weight is void or illegal in a particular case the actual weight for dutiable purposes may be determined by evidence aliunde.

In the case at bar the first weights have by the proper customs officers been found fraudulent and void, and amended certificates of weight with indorsements showing how the same were ascertained have been filed in the case and submitted to the collector. The collector has satisfied himself, as he says, upon evidence produced that the first weights were fraudulent and has reliquidated upon the basis of the

weigher's amended returns. These returns and amended certificates are a part of the case and would seem to be sufficient, if it were necessary to show fraud in the first instance, to support the judgment of reliquidation. Thereby importers were put upon notice as to the particular fraud found. They cannot claim ignorance, uncertainty, or embarrassment as to what the issue was, and they better than anyone else, should have knowledge of the facts necessary to meet the same. They were not entitled to a hearing before the collector upon this question, but could get their day in court by appealing from the reliquidation to the board, as they have done.

We are of opinion, for the reasons hereinbefore set forth, that it was not incumbent upon the government in the first instance to introduce evidence tending to support the correctness of the reliquidation of the collector, but that in this as in other cases of reliquidation where the collector has acted within his authority it is the duty of the importer to go ahead and by proof overcome the presumed correctness of the collector's action. Until this is done it is *prima facie* correct and must be affirmed.

The judgment of the Board of General Appraisers is reversed.

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### TARIFF ACT 1922, § 521, 42 STAT. 973.

U. S. Code, Tit. 19, § 409 (19 USCA § 409).

Sec. 521. *Reliquidation of Duties*.—Whenever any merchandise has been entered and passed free of duty, and whenever duties upon any imported merchandise have been liquidated and paid and the merchandise has been delivered to the consignee, or his agent, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the date of entry, or after the expiration of sixty days after the date of liquidation when liquidation is made more than ten months after the date of entry, in the absence of fraud and in the absence of protest by the consignee, or his agent, or by an American manufacturer, producer, or wholesaler, be final and conclusive upon all parties. If the collector finds probable cause to believe there is fraud in the case, he may reliquidate within two years after the date of entry, or after the date of liquidation when liquidation is made more than ten months after the date of entry.<sup>16</sup>

<sup>16</sup> Assessing authority held, on appeal, bound by its assessment. *Horton & Son v. Walsall Assessment Committee*, [1898] 2 Q. B. 237; *Hendon Paper Works Co. v. Sunderland Assessment Committee*, [1915] 1 K. B. 763.

SECTION 58.—ADMINISTRATIVE FINALITY AS AGAINST  
THE PRIVATE RIGHT—STATUTORY RIGHTS <sup>17</sup>

## STATE ex rel. COOK v. HOUSER.

Supreme Court of Wisconsin, 1904. 122 Wis. 534, 559, 100 N. W. 964, 971. .

MARSHALL, J. \* \* \* Whatever privileges are within the power of the Legislature to grant may be granted upon such conditions and subject to such regulations as it in its wisdom may see fit to impose. That is elementary. In dealing with this subject care should be exercised to distinguish between common-law rights, which are within the protection of constitutional restraints upon legislative authority, and mere legislative creations. A failure in that regard would be quite likely to lead one astray. The right to vote and to secrecy in respect to the elector's opinion thus expressed cannot be impaired, but the enjoyment of those rights which are within constitutional protection may have every legislative aid which the wisdom of the lawmaking power may see fit to afford. The power of regulation to that end is limited only by what is reasonable. Any attempt to regulate passing that barrier is destructive of the right involved, not an aid to its enjoyment, and hence is not legitimate. \* \* \*

So the plan for an official ballot, and opportunity for party representation thereon, are matter of legitimate legislative creation; hence the conditions of party representation upon such ballot are purely within legislative control. Whoever joins a political party impliedly submits to regulations in that regard, as in effect by-laws of the organization, the same as every member of any other voluntary association, upon joining the same, irrevocably pledges himself to be bound by the decisions of its tribunals, save as regards jurisdictional errors. This court very recently dealt with such relations in *Bartlett v. L. Bartlett & Son Co.*, 116 Wis. 450, 93 N. W. 473, and *Wood v. Chamber of Commerce*, 119 Wis. 367, 96 N. W. 835.

Errors of judgment committed by such a tribunal, however numerous or serious, even though by reason thereof justice, except as regards mere form, be denied and wrong from an original standpoint be made to bear the stamp of right, does not militate at all against the binding effect of the result. All must bow to it as the right of the matter from a legal standpoint, however much from a moral aspect it may appear to be wrong. That applies to all tribunals of voluntary organizations and to all special tribunals created by

<sup>17</sup> See T. R. Powell, *Conclusiveness of Administrative Determinations in the Federal Government*, 1 *Am. Polit. Science Review*, 583; S. C. Wiel, *Administrative Finality*, 38 *Harv. Law Rev.* 447.

law to deal with legislative rights and privileges. There are so many illustrations of approved legislation as regards the latter that it is strange that a layman, even, should marvel at the existence of such laws, and passing strange that others should. There are hundreds of such tribunals. Every board of review, every one of the numerous official boards and councils empowered to act judicially, is such a one. Who would expect to avoid the decision of a board of review, or the board of law examiners, or the board of control, or the board of regents, or the board of dental examiners, as to any matter within its jurisdiction, except for errors of a jurisdictional character? The books are full of decisions in harmony with what is here suggested. The following are examples: *State ex rel. Coffey v. Chittenden*, 112 Wis. 569, 88 N. W. 587; *State ex rel. Vilas v. Wharton*, 117 Wis. 558, 94 N. W. 359; *State ex rel. Augusta v. Losby*, 115 Wis. 57, 90 N. W. 188; *State ex rel. Heller v. Lawler*, 103 Wis. 460, 79 N. W. 777; *State ex rel. N. C. Foster Lumber Co. v. Williams*, 123 Wis. 61, 100 N. W. 1048, and *State ex rel. Gray v. Common Council*, 104 Wis. 622, 80 N. W. 942. \* \* \*

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PROVIDENT SAVING LIFE ASSUR. SOCIETY v. CUTTING,  
Insurance Com'r.

Supreme Judicial Court of Massachusetts, 1902. 181 Mass. 261, 63 N. E. 433, 92 Am. St. Rep. 415.

Case reserved from Supreme Judicial Court, Suffolk county.

Petition for mandamus by the Provident Savings Life Assurance Society of New York against Frederick L. Cutting, Insurance Commissioner of the Commonwealth. Case reserved for the determination of the full court on the petition, demurrer, and agreed statement of facts. Petition dismissed.

KNOWLTON, J. This is a petition for a writ of mandamus to compel the insurance commissioner to change his valuation of the outstanding policies of the petitioner so as to diminish the reserve liability for which it must have assets to meet the requirements of our law. The duty of the commissioner to make this valuation under Rev. Laws, c. 118, § 11, is only a preliminary part of his duty, under section 17 of this chapter, annually to "make a report to the general court of his official transactions," in which he shall include, among other things, "an exhibit of the financial condition and business transactions of the several insurance companies as disclosed by official examinations of the same, or by their annual statements, abstracts of which statements, with his valuation of life policies, shall appear therein, and such other information and comments relative to insurance and to the public interest therein, as he thinks proper." It is important in one other way. It naturally is used in part as a foundation for action in case he is called upon, under section 7, to revoke or suspend the certif-



icates and authority granted to a foreign insurance company because he is of opinion that it is "in an unsound condition," or "that its actual funds, exclusive of its capital, are less than its liabilities."

The complaint against the respondent is that in applying the rule of computation prescribed by the statute to a certain class of policies issued by the petitioner, he has made a mistake in holding that, for the purpose of ascertaining their reserve value, they are to be treated as being from their inception policies for life or for an endowment period, and not as policies for one year only, with an option in the assured to continue them in force at the end of the year without a further physical examination, and without an increase of premium on account of his greater age. It is not contended that he has acted in bad faith, or has willfully disobeyed the law. There is only a difference of opinion between the petitioner and the respondent as to the proper application of the rule prescribed by the statute to the methods of the petitioner in insuring under this class of policies.

A preliminary question is whether the decision of the commissioner in a matter of this kind is subject to revision by this court on an application for a writ of mandamus. In various proceedings affecting foreign insurance companies the statute makes no provision for an appeal from his decision, but manifestly intends that his conclusion, in the exercise of his judgment, shall be final. Particularly is this so in the valuation of policies and assets and the determination of the financial condition of foreign companies doing business in this commonwealth. "Before granting certificates of authority to an insurance company to issue policies or make contracts of insurance, the commissioner shall be satisfied by such examination as he may make and such evidence as he may require, that such company is otherwise qualified under the laws of this commonwealth to transact business herein." Rev. Laws, c. 118, § 6. By Rev. Laws, c. 120, § 10, he has absolute authority to give or withhold his indorsement upon a requisition of the directors for the withdrawal of any portion of an emergency fund deposited by an assessment insurance company with the treasurer of the commonwealth. Under Rev. Laws, c. 120, § 12, the authority granted to a foreign assessment insurance company to do business in this commonwealth "shall be revoked if the insurance commissioner, on investigation, is satisfied that such corporation is not paying in full the maximum amount named in its policies, or that it has otherwise failed to comply with any provision of this chapter or its own contracts."

In regard to the reduction of capital stock of an insurance company it is provided by Rev. Laws, c. 118, § 37, that, "if the commissioner finds that the reduction is made in conformity to law, and that it will not be prejudicial to the public, he shall endorse his approval upon the certificate." By section 67 of this chapter a company organized under the laws of another state may be admitted to do business in this commonwealth, "if in the opinion of the commissioner, it is in sound financial condition," etc. Section 72 provides that "no domestic

life insurance company shall reinsure its risks except by permission of the insurance commissioner; but may reinsure not exceeding one-half of any individual risk." Under section 78 "no foreign insurance company shall be so admitted and authorized to do business until \* \* \* it has satisfied the insurance commissioner" of numerous facts therein stated. The terms of each of these sections make it plain that the opinion and judgment of the insurance commissioner is to be final and conclusive in determining these important matters upon which the rights of the insurance companies and the protection of the public depend. Most, if not all, of these several conclusions involve the consideration of questions of law as well as questions of fact.

In regard to the only important results depending upon the valuation of policies to ascertain the reserve liability of insurance companies, namely, the making of a report to the Legislature, and the revocation or suspension of certificates of authority to do business, it seems that the judgment of the commissioner is not subject to revision. Under section 17 he is to make a report of the financial condition of insurance companies and of their transactions and the valuation of life policies, which must mean a report, according to his understanding of the facts, founded on examinations and statements. By section 7 he is to revoke or suspend certificates of authority granted to a foreign insurance company if he "is of opinion, upon examination or other evidence, that a foreign insurance company is in an unsound condition, that it has failed to comply with the law, or that its actual funds exclusive of its capital, if it is a life insurance company, are less than its liabilities," etc., and no new business can thereafter be done by such company "until its authority to do business is restored by the commissioner." If the "ground for revocation or suspension relates only to the financial condition or soundness of the company, or to a deficiency in its assets," there is no appeal from a decision of the commissioner. In other cases the company may apply to the Supreme Judicial Court for a reversal of his decision. Here again is an indication that the judgment of the commissioner in all matters of law or fact involved in determining the financial condition of a company for a purpose affecting it, even to the extent of terminating its existence as an insurer in this commonwealth, is to be final and conclusive.

The valuation of policies for the purpose of determining the reserve liability is only one of the processes necessary to determine the company's financial condition. It involves an application of the statutory rule to each policy, in connection with the methods and practices in the transaction of the business that exist either as a part of the science of life insurance or otherwise outside of the stipulations of the policy. New forms of policies may be adopted which were not known when the statutory rule was established, and new questions may arise depending in part upon the principles of life insurance as a science and in part upon the practices of the company, as well as upon rules of

law, in determining how the statutory rule shall apply to these policies. In the present case, even if the contracts referred to are to be considered technically as the petitioner contends, the statute is silent as to whether the value of the option to continue the insurance at the end of the year without an examination, and at the premium fixed for an age a year younger than the assured would then have attained, is not to be considered in determining the reserve liability of the company under the contract.

Questions of fact and questions of law must be considered in coming to a conclusion. In valuing all the assets of a company, which usually comprise investments of many kinds, questions of law as well as questions of fact must inevitably arise. If we are to examine each policy or class of policies, together with the methods of the company in fixing their premiums, and any other facts pertaining to the policies which are different from those belonging to other kinds of policies, for the purpose of determining whether the insurance commissioner has made a mistake of law in valuing them, we know of no good reason why his valuation of each item of the assets might not be examined to see if it is affected by a mistake of law. A mistake of the latter kind might be as detrimental to the company as one of the former, whether viewed in reference to its effect upon the commissioner's report or upon his determination to revoke or suspend the certificate of authority. If the commissioner's mistakes of law are to be corrected on an application for a writ of mandamus, his mistakes in the construction of contracts entering into investments should be dealt with as well as his mistakes in the construction of contracts for insurance.

We are of opinion that the statute does not contemplate a revision of the commissioner's decisions in this way. This officer is intrusted with the performance of important duties, and invested with power to use his discretion and judgment in matters which call for prompt and decisive action, and which would be difficult to investigate in our courts. We are of opinion that, at least so long as he acts in good faith, intending to obey the law, we cannot, by a writ of mandamus, compel him to change his conclusions, either of law or fact, in the valuation of the policies or assets of a life insurance company.

Without considering whether any mistake appears, we must deny the petitioner's application. Similar decisions have been made in regard to the powers of the insurance commissioner in Ohio and Kansas. *State v. Moore*, 42 Ohio St. 103; *Insurance Co. v. Wilder*, 40 Kan. 561, 20 Pac. 265.

Petition dismissed.\*

\* See E. W. Patterson, *The Insurance Commissioner in the United States*, p. 495.

## SECTION 59.—ADVERSE FINALITY—CONSTITUTIONAL RIGHTS

## OHIO VALLEY WATER CO. v. BEN AVON BOROUGH.

Supreme Court of the United States, 1920. 253 U. S. 287, 40 S. Ct. 527, 64 L. Ed. 908.

Proceeding instituted before the Public Service Commission of Pennsylvania by Ben Avon Borough and others against the Ohio-Valley Water Company. A decree of the Superior Court, reversing an order of the Commission, was reversed, and the order reinstated, by the Supreme Court of Pennsylvania (260 Pa. 289, 103 A. 744), and the Water Company brings error. Reversed and remanded.

Mr. Justice McREYNOLDS delivered the opinion of the court.

Acting upon a complaint charging plaintiff in error, a water company, with demanding unreasonable rates, the Public Service Commission of Pennsylvania instituted an investigation and took evidence. It found the fair value of the company's property to be \$924,744 and ordered establishment of a new and lower schedule which would yield 7 per centum thereon over and above operating expenses and depreciation.

Claiming the commission's valuation was much too low and that the order would deprive it of a reasonable return and thereby confiscate its property, the company appealed to the Superior Court. The latter reviewed the certified record, appraised the property at \$1,324,621.80, reversed the order, and remanded the proceeding, with directions to authorize rates sufficient to yield 7 per centum of such sum.

The Supreme Court of the state reversed the decree and reinstated the order, saying: "The appeal [to the Superior Court] presented for determination the question whether the order appealed from was reasonable and in conformity with law, and in this inquiry was involved the question of the fair value, for rate-making purposes, of the property of appellant, and the amount of revenue which appellant was entitled to collect. In its decision upon the appeal, the Superior Court differed from the commission as to the proper valuation to be placed upon several items going to make up the fair value of the property of the water company for rate-making purposes."

It considered those items and held that as there was competent evidence tending to sustain the commission's conclusion and no abuse of discretion appeared, the Superior Court should not have interfered therewith. "A careful examination of the voluminous record in this case has led us to the conclusion that in the items wherein the Superior Court differed from the commission upon the question of values there



was merely the substitution of its judgment for that of the commission in determining that the order of the latter was unreasonable."

Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the commission comes to be considered on appeal.

The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150; *Lake Erie & Western R. R. Co. v. State Public Utility Commission*, 249 U. S. 422, 424, 39 S. Ct. 345, 63 L. Ed. 684. In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment. *Missouri Pac. R. R. v. Tucker*, 230 U. S. 340, 347, 33 S. Ct. 961, 57 L. Ed. 1507; *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651, 660, 661, 35 S. Ct. 214, 59 L. Ed. 405; *Missouri v. Chicago, Burlington & Quincy R. R.*, 241 U. S. 533, 538, 36 S. Ct. 715, 60 L. Ed. 1148; *Oklahoma Operating Co. v. Love* (March 22, 1920), 252 U. S. 331, 40 S. Ct. 338, 64 L. Ed. 596.

Here the insistence is that the Public Service Company Law as construed and applied by the Supreme Court has deprived plaintiff in error of the right to be so heard; and this is true if the appeal therein specifically provided is the only clearly authorized proceeding where the commission's order may be challenged because confiscatory. Thus far plaintiff in error has not succeeded in obtaining the review for which the Fourteenth Amendment requires the state to provide.

Article 6, Public Service Company Law of Pennsylvania (P. L. 1913, p. 1429):

"Sec. 31. No injunction shall issue modifying, suspending, staying, or annulling any order of the commission, or of a commissioner, except upon notice to the commission and after cause shown upon a hearing. The court of common pleas of Dauphin county is hereby clothed with exclusive jurisdiction throughout the commonwealth of all proceedings for such injunctions, subject to an appeal to the Supreme Court as aforesaid. Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act."

It is argued that this section makes adequate provision for testing judicially any order by the commission when alleged to be confiscatory, and that plaintiff in error has failed to take advantage of the opportunity so provided.

The Supreme Court of Pennsylvania has not ruled upon effect or meaning of section 31, or expressed any view concerning it. So far as counsel have been able to discover, no relief against an order alleged to be confiscatory has been sought under this section, although much litigation has arisen under the act. It is part of the article entitled "Practice and Procedure Before the Commission and upon Appeal." Certain opinions by the Supreme Court seem to indicate that all objections to the commission's orders must be determined upon appeal—*St. Clair Borough v. Tamaqua & Pottsville Electric Ry. Co.*, 259 Pa. 462, 103 A. 287; *Pittsburgh Railways Co. v. Pittsburgh*, 260 Pa. 424, 103 A. 959—but they do not definitely decide the point.

Taking into consideration the whole act, statements by the state Supreme Court concerning the general plan of regulation, and admitted local practice, we are unable to say that section 31 offered an opportunity to test the order so clear and definite that plaintiff in error was obliged to proceed thereunder or suffer loss of rights guaranteed by the federal Constitution. On the contrary, after specifying that within 30 days an appeal may be taken to the Superior Court (section 17), the act provides (section 22):

"At the hearing of the appeal the said court shall, upon the record certified to it by the commission, determine whether or not the order appealed from is reasonable and in conformity with law."

But for the opinion of the Supreme Court in the present cause, this would seem to empower the Superior Court judicially to hear and determine all objections to an order on appeal and to make its jurisdiction in respect thereto exclusive. Of this the latter court apparently entertained no doubt; and certainly counsel did not fatally err by adopting that view, whatever meaning finally may be attributed to section 31.

Without doubt the duties of the courts upon appeals under the act are judicial in character—not legislative, as in *Prentis v. Atlantic Coast Line*, *supra*. This is not disputed; but their jurisdiction, as ruled by the Supreme Court, stopped short of what must be plainly intrusted to some court in order that there may be due process of law.

✕ Plaintiff in error has not had proper opportunity for an adequate judicial hearing as to confiscation; and unless such an opportunity is now available, and can be definitely indicated by the court below in the exercise of its power finally to construe laws of the state (including of course section 31), the challenged order is invalid. ✓

The judgment of the Supreme Court of Pennsylvania must be reversed, and the cause remanded there, with instructions to take further action not inconsistent with this opinion.

Reversed.

Mr. Justice BRANDEIS, dissenting. \* \* \*

First. The commission's order, although entered in a proceeding commenced upon due notice, conducted according to judicial practice and participated in throughout by the company, was a legislative order; and, being such, the company was entitled to a judicial review. *Prentis*

v. Atlantic Coast Line, 211 U. S. 210, 228, 29 S. Ct. 67, 53 L. Ed. 150. The method of review invoked by the company under specific provisions of the statute was this: A stenographic report is made of all the evidence introduced before the commission. On a record consisting of such evidence, the opinion and the orders, the case is appealed to the Superior Court, which is given power, if it finds that the order appealed from "is unreasonable or based upon incompetent evidence materially affecting the determination of the commission or is otherwise not in conformity with law" either to reverse the order or to remand the record to the commission with direction to reconsider the matter and make such order as shall be reasonable and in conformity with law. No additional evidence may be introduced in the Superior Court; but it may remand the case to the commission with directions to hear newly discovered evidence and upon the record thus supplemented to enter such order as may be reasonable and in conformity with law. From such new order a like appeal lies to that court. Act July 26, 1913, No. 854, §§ 21-25 (P. L. 1913, pp. 1427, 1428); Act June 3, 1915, No. 345 (P. L. 1915, p. 779). The Supreme Court construed this act as denying to the Superior Court the power to pass upon the weight of evidence; and the company contends that for this reason the review had does not satisfy the constitutional requirements of a judicial review.<sup>18</sup>

Whether the appeal to the Superior Court fails, for the reason assigned or for some other reason, to satisfy the constitutional requirements of a judicial review, we need not determine, because the statute left open to the company, besides this limited review, the right to resort in the state courts, as well as in the federal court, to another and unrestricted remedy, the one commonly pursued when challenging the validity of a legislative order of this nature, namely, a suit in equity to enjoin its enforcement. \* \* \* 19

<sup>18</sup> In *Napa Valley Electric Co. v. Railway Commissioners*, 251 U. S. 366, 40 S. Ct. 174, 64 L. Ed. 310, this court had before it in section 67 of the Public Utilities Act of California (St. Extra Sess. 1911, p. 55) a procedure substantially similar to that provided by sections 21-25 of the Pennsylvania act set forth above. The court strongly intimated, if it did not decide, that under the provisions of the act the mere denial of a petition to the Supreme Court of the state for a writ of certiorari amounted to an adequate judicial determination of the petitioner's rights.—[*Note by judge.*]

<sup>19</sup> See *Nega v. Chicago Railway Co.*, 317 Ill. 482, 148 N. E. 250, 39 A. L. R. 1057 (1925); *Matter of Simons v. McGuire*, 204 N. Y. 253, 97 N. E. 526 (1912); also *United States v. Ju Toy*, 198 U. S. 253, 25 S. Ct. 644, 49 L. Ed. 1040 (1905); and as to this case *Ng Fung Ho v. White*, 259 U. S. 276, 284, 42 S. Ct. 492, 66 L. Ed. 938 (1922), ante, p. 661.

Also see John Dickinson, administrative Justice and the Supremacy of the Law (1927) pp. 195-202.

## SECTION 60.—ADVERSE FINALITY—QUESTIONS OF VALUE

## SPENCER &amp; GARDNER v. PEOPLE.

Supreme Court of Illinois, 1873. 68 Ill. 510.

Appeal from the circuit court of Will county.

This was an application by the collector of Will county, to the county court of that county, for judgment against certain lands for taxes due thereon, for the year 1871, and costs. The case was taken by appeal to the circuit court.

The landowners filed the following objections to the rendition of judgment: First, that the assessment was not in compliance with the Constitution, which provides that taxes must be so levied as to be uniform, and in proportion to the value of the property upon which they operate; second, that the property was not assessed at its true value, being assessed several times higher than property of equal value adjoining the same.

The defendants below offered to prove the truth of their objections, which the court refused to allow, on the ground that the defendants had waived the objections by not making them before the proper boards of review, and rendered judgment against the lands and lots for the taxes assessed thereon, and the defendants appealed.

Mr. Justice SHELDON delivered the opinion of the court.

The question presented by this record is whether, upon an application for judgment against real estate for delinquent taxes, the objection may be made that there was too high a valuation placed upon the land by the assessor, in making the assessment.

The Constitution provides that the General Assembly shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise.

The provision of the Constitution has respect to the laws which should be passed by the Legislature for the imposition of taxes, and not to the practical working of the laws. The framers of the Constitution could not have contemplated any such consequence as that a tax levy should be void, in case an assessor should happen to omit to assess any taxable property, or should make an incorrect valuation of any property, whereby would be produced the result that every person would not actually pay a tax in proportion to the value of his property. There is no objection made that the revenue law is not framed in accordance with the constitutional principle.



The assessor is the officer who has been provided by the Legislature for fixing the valuation of property for the purpose of taxation.

No appeal to any court is provided from the assessor's judgment in fixing the value of property for taxation,<sup>20</sup> nor has any express authority been conferred upon a court to revise such valuation, or to correct an assessment, or order a new one, or to make a rebate of any tax.

And we are of opinion that the power does not belong to any court to revise the assessment made by an assessor, and change or set aside any valuation of property made by him, where his judgment has been honestly exercised, and upon a right basis. To do so would seem to be to arrogate the power of ascertaining the value of property for taxation, which ascertainment of value, the Constitution declares, shall be by some person or persons designated by the General Assembly, and not otherwise.

The Legislature has provided a special board for the review of assessments in the matter of valuation, as follows: The assessor, town clerk and supervisor shall attend at the time and place specified in the notice (before directed to be given), and on the application of any person conceiving himself aggrieved they shall review the assessment; and when the person so objecting thereto shall make an affidavit that the value of his personal estate does not exceed a certain sum specified in such affidavit, the assessor shall reduce the assessment to the sum specified in such affidavit; and if he, or any other one, objects to the valuation put upon any of their real estate, the board shall hear the objections, and may reduce the same if a majority of the board think it advisable, and in such case the assessor shall correct his list. Laws 1861, p. 242. This was the law in force at the time this assessment was made, and the appellant should have applied to that board for the correction of any overvaluation of his property.

An omission to assess some other persons liable to taxation, or to assess a portion of the taxable property of others, would be an objection of a like character with the one here made, as the effect would be the same, though it might be less in degree, as that of an overvaluation, to wit, to cause the complaining taxpayer to bear an undue proportion of the burthen of taxation. Yet it has been held that such an omission would not affect the validity of a tax. *Merritt et al. v. Farris et al.*, 22 Ill. 303; *Dunham et al. v. City of Chicago*, 55 Ill. 357.

In the case of *Albany & West Stockbridge R. Co. v. Town of Canaan*, 16 Barb. (N. Y.) 244, it was held that the action of assessors, so long as they confine themselves within the statute rule, is conclusive, however grossly they may err in estimating the amount,

<sup>20</sup> See, as to earlier law, *Bureau County v. C., B. & Q. R. Co.*, 44 Ill. 229 (1867).

and that the tax based upon the assessment is like a judicial sentence, and can be assailed only for fraud or want of jurisdiction. So it was held, in *Weaver v. Devendorff*, 3 Denio (N. Y.) 117, that in fixing the value of taxable property by an assessor, the power exercised is, in its nature, purely judicial.

In *City of Chicago v. Burtice et al.*, 24 Ill. 489, it was said that the court would inquire whether the commissioners for assessment fraudulently valued the property above its true value, but that if they honestly estimated property too high or too low, the court would not disturb the assessment; and see, to the like effect, *Elliott v. City of Chicago*, 48 Ill. 293, and *Jenks et al. v. City of Chicago*, 48 Ill. 296. The case of *Creote et al. v. City of Chicago*, 56 Ill. 423, which is relied on by appellant's counsel, we do not regard as materially variant from the view here expressed. It was only held there that the defense of fraud in the making of the assessment might be made, as also that the assessment was made on a wrong basis, in violation of the statute and the Constitution.

In the present case there was no suggestion of fraud, or that the assessment was made on a wrong basis. The defense against the entry of judgment, as offered, we must regard as simply one of an excess of valuation, made in the honest exercise of the judgment of the assessor, and we are of opinion it was rightly excluded by the court.

The judgment is affirmed.

Judgment affirmed.<sup>21</sup>

<sup>21</sup> Accord: *New Orleans v. Railroad Co.*, 37 La. Ann. 45 (1885); *Rockland v. Rockland Water Co.*, 82 Me. 183, 19 Atl. 163 (1889); *State v. Sadler*, 21 Nev. 13, 23 Pac. 799 (1890); *Stanley v. Supervisors of Albany*, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000 (1887); *Shumway v. Baker Co.*, 3 Or. 246 (1870).

*City of Chicago v. Burtice*, 24 Ill. 489, 492 (1860): "It is nothing less than a legal fraud if the commissioners fix a valuation upon property above its real value, for the purpose of evading the provisions of the law, which forbids them to assess property more than three per cent. in any one year. It is true that the court ought not willingly to ascribe to the commissioners such motives; but when an outrageous valuation is shown, where, without it, the amount desired could not be assessed within the three per cent., it would seem to leave the court at liberty to draw no other conclusion.

\* \* \* We hold, without hesitation, that this is a proper subject of inquiry, and, when established, constitutes a good defense. As no mathematical rule can be applied to determine, with certainty, the value of real estate, and especially unimproved city property, it must be expected that the judgments of men will differ, and, if commissioners honestly estimate property too high or too low, the court will not disturb it; but when an assessment is made so wide of the true value, as established by witnesses, as to raise the presumption that it was overestimated from design, and especially when the court can see the motives prompting to such design, it will not and ought not to hesitate so to find. The court did not err in admitting proof of the value of the property."

See also *Burton Stock Car Co. v. Traeger*, 187 Ill. 9, 58 N. E. 418 (1900); *State Board of Equalization v. People*, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513 (1901), valuation too low; *Chicago Union Traction Co. v. State Board of Equalization (C. C.)* 112 F. 607 (1901); *Olympia v. Stevens*, 15 Wash. 601, 47 P. 11 (1896).

## HILTON v. MERRITT.

Supreme Court of United States, 1884. 110 U. S. 97, 3 Sup. Ct. 548,  
28 L. Ed. 83.

WOODS, J. \* \* \* The question presented by the exception of plaintiffs is whether the valuation of merchandise made by the customs officers under the statutes of the United States for the purpose of levying duties thereon is, in the absence of fraud on the part of the officers, conclusive on the importer, or is such valuation reviewable in an action at law brought by the importer to recover back duties paid under protest? \* \* \*

The provisions of the statute law show with what care Congress has provided for the fair appraisal of imported merchandise, subject to duty, and they show also the intention of Congress to make the appraisal final and conclusive. When the value of the merchandise is ascertained by the officers appointed by law, and the statutory provisions for appeal have been exhausted, the statute declares that the "appraisement thus determined shall be final and deemed to be the true value, and the duties shall be levied thereon accordingly." This language would seem to leave no room for doubt or construction.

The contention of the appellants is that after the appraisal of merchandise has been made by the assistant appraiser, and has been reviewed by the general appraiser, and a protest has been entered against his action by the importer, and the collector has appointed a special tribunal, consisting of a general and merchant appraiser, to fix the value, and they have reported each a different valuation to the collector, who has decided between them and fixed the valuation upon which the duties were to be laid, that in every such case the importer is entitled to contest still further the appraisement and have it reviewed by a jury in an action at law to recover back the duties paid.

After Congress has declared that the appraisement of the customs officers should be final for the purpose of levying duties, the right of the importer to take the verdict of a jury upon the correctness of the appraisement should be declared in clear and explicit terms. So far from this being the case, we do not find that Congress has given the right at all. If, in every suit brought to recover duties paid under protest, the jury were allowed to review the appraisement made by the customs officers, the result would be great uncertainty and inequality in the collection of duties on imports. It is quite possible that no two juries would agree upon the value of different invoices of the same goods. The legislation of Congress, to which we have referred, was designed, as it appears to us, to exclude any such method of ascertaining the dutiable value of goods. This court, in referring to the general policy of the laws for the collection of duties, said in *Bartlett v. Kane*, 16 How. 263, 14 L. Ed.

931: "The interposition of the courts in the appraisement of importations would involve the collection of the revenue in inextricable confusion." And, referring to section 3 of the act of March 3, 1851, which is reproduced in section 2930, Revised Statutes, this court declared, in *Belcher v. Linn*, 24 How. 508, 16 L. Ed. 754, that, in the absence of fraud, the decision of the customs officers "is final and conclusive, and their appraisement, in contemplation of law, becomes, for the purpose of calculating and assessing the duties due to the United States, the true dutiable value of the importation." To the same effect, see *Tappan v. United States*, 2 Mason, 393, Fed. Cas. No. 13,749, and *Bailey v. Goodrich*, 2 Cliff. 597, Fed. Cas. No. 735.

The appellants contend, however, that the right to review the appraisement of the customs officers by a jury trial is given to the importer by sections 2931 and 3011 of the Revised Statutes. The first of these sections provides that on the entry of any merchandise the decision of the collector as to the rate and amount of duties shall be final and conclusive, unless the importer shall, within two days after the ascertainment and liquidation of the proper officers of the customs, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth distinctly and specifically the ground of his objection thereto, and shall within thirty days after such ascertainment and liquidation appeal therefrom to the Secretary of the Treasury, and the decision of the Secretary in such appeal shall be final and conclusive, and such merchandise shall be liable to duty accordingly, unless suit shall be brought within ninety days after such decision of the Secretary of the Treasury. Section 3011 provides that any person who shall have made payment under protest of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid; but no recovery shall be allowed in such action unless a protest and appeal shall have been taken as prescribed in section 2931.

The argument is that by these sections the appraisement which had been declared final by section 2930 is opened for review by a jury trial. Such is not, in our opinion, a fair construction of this legislation. Considering the acts of Congress as establishing a system, and giving force to all the sections, its plain and obvious meaning is that the appraisement of the customs officers shall be final, but all other questions relating to the rate and amount of duties may, after the importer has taken the prescribed steps, be reviewed in an action at law to recover duties unlawfully exacted. The rate and amount of duties depend on the classification of the imported merchandise; that is to say, on what schedule it belongs to. Questions frequently arise whether an enumerated article belongs to one section or another, and section 2499 of the Revised Statutes provides



that there shall be levied on every nonenumerated article which bears a similitude either in material, quality, texture, or the use to which it may be applied to any enumerated article chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned. In determining the rate and amount of duties, the value of the merchandise is one factor; the question what schedule it properly falls under is another.

Congress has said that the valuation of the customs officers shall be final, but there is still a field left for the operation of the sections on which the plaintiffs in error rely. Questions relating to the classification of imports, and consequently to the rate and amount of duty, are open to review in an action at law. This construction gives effect to both provisions of the law. If we yield to the contention and construction of plaintiffs in error, we must strike from the statute the clause which renders the valuation of dutiable merchandise final.

We are of opinion, therefore, that the valuation made by the customs officers was not open to question in an action at law as long as the officers acted without fraud and within the power conferred on them by the statute. The evidence offered by the plaintiffs, and ruled out by the court, tended only to show carelessness or irregularity in the discharge of their duties by the customs officers, but not that they were assuming powers not conferred by the statute, and the questions which the plaintiffs proposed to submit to the jury were, in the view we take of the statute, immaterial and irrelevant. \* \* \*

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### STANLEY v. ALBANY COUNTY SUP'RS.

Supreme Court of United States, 1887. 121 U. S. 535, 7 Sup. Ct. 1234,  
30 L. Ed. 1000.

FIELD, J. \* \* \* In nearly all the states, probably in all of them, provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization, as they often are termed, with sometimes a right of appeal from their decision to the courts of law. They are established to carry into effect the general rule of equality and uniformity of taxation required by constitutional or statutory provisions. Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgments, and the uncertainty attending all human evidence, preclude the possibility of this attainment. Intelligent men differ as to the value of even the most common objects before them—of animals, houses, and lands in constant use. The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity found in

the Constitutions of some states is complied with when designed and manifest departures from the rule are avoided.

To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property. Their action is judicial in its character. They pass judgment on the value of the property upon personal examination and evidence respecting it. Their action being judicial, their judgments in cases within their jurisdiction are not open to collateral attack. If not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment. As said in one of the cases cited, the money collected on such assessment cannot be recovered back in an action at law, any more than money collected on an erroneous judgment of a court of competent jurisdiction before it is reversed.

When the overvaluation of property has arisen from the adoption of a rule of appraisal which conflicts with a constitutional or statutory direction, and operates unequally not merely on a single individual, but on a large class of individuals or corporations, a party aggrieved may resort to a court of equity to restrain the exaction of the excess, upon payment or tender of what is admitted to be due. This was the course pursued and approved in *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903. \* \* \*

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## SECTION 61.—ADVERSE FINALITY—QUESTIONS OF FACT

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### ALLBUTT v. GENERAL COUNCIL OF MEDICAL EDUCATION AND REGISTRATION et al.

Court of Appeal, 1889. 23 Q. B. Div. 400.

Appeal by the plaintiff against the judgment of Pollock, B., at the trial of the action.

The plaintiff, Henry Arthur Allbutt, was a medical practitioner, who had been registered as such under the provisions of the Medical Act, 1858 (21 & 22 Vict. c. 90). The defendants were the General Council of Medical Education and Registration of the United Kingdom (constituted under that act) and W. J. C. Miller, their registrar.

LOPES, L. J., delivered the judgment of the court (LORD COLERIDGE, C. J., and LINDLEY and LOPES, L. JJ., sitting) as follows:

The plaintiff complains that the defendants (the General Council of Medical Education and Registration of the United Kingdom) have wrongfully and unlawfully erased his name from the medical register, and asks for a mandamus commanding the defendants to restore his

name to the register. The plaintiff also complains that the defendants have libeled him, by printing and publishing of him in a book, entitled *Minutes of the General Council*, that his name had been erased from the Medical Registry, page 317, and that in the opinion of the council the plaintiff had committed the offense charged against him—that is to say, of having published and publicly caused to be sold a work entitled “*The Wife’s Handbook*,” in London and elsewhere, and at so low a price as to bring the work within the reach of both sexes, to the detriment of public morals, and that the offense was, in the opinion of the council, infamous conduct in a professional respect. With regard to the erasure of the plaintiff’s name, the plaintiff says that the defendants acted without jurisdiction, that there was no evidence of any infamous conduct in a professional respect, and, therefore, nothing upon which to found their jurisdiction. The defendants say, on the other hand, that they lawfully, and in the exercise of a jurisdiction conferred upon them by the act of Parliament, struck the plaintiff’s name off the register, and that, as there was jurisdiction to enter upon this inquiry, they (the Medical Council) are the sole judges of what was done during the inquiry which they had jurisdiction to initiate. The learned judge thought that there was no evidence of any of the complaints which he ought to leave to the jury, and gave judgment for the defendants.

The section upon which the council have acted in erasing the plaintiff’s name is the twenty-ninth section of 21 & 22 Vict. c. 90, which says: “If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanor, or in Scotland of any crime or offense, or shall after due inquiry be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register.” Having regard to the nature of the complaint, the council clearly had jurisdiction to enter upon the inquiry, and, having that jurisdiction, are constituted by the legislature the sole judges whether that complaint was substantiated. To use the words of Cockburn, C. J., in *Ex parte La Mert*, 33 L. J. (Q. B.) 70: “This court has no more power to review their decision than they would have, in the present mode of proceeding, of determining whether the facts had justified a conviction for felony or misdemeanor under the first branch of the section.”

It is said by the plaintiff that there was no “due inquiry,” and that that question ought to have been left to the jury. We think that there was no evidence of any absence of a due inquiry which ought to have been left to the jury. All charges of mala fides were withdrawn, and it was admitted that the council acted honestly, and without any improper feeling or motive towards the plaintiff. We can find nothing irregular in the proceedings of the council; the plain-

tiff had every opportunity afforded to him of bringing his case before the council, who heard his counsel and his evidence, and adjudicated thereon. \* \* \* 22

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NISHIMURA EKIU v. UNITED STATES et al.

Supreme Court of United States, 1892. 142 U. S. 651, 12 S. Ct. 336, 35 L. Ed. 1146.

Appeal from the Circuit Court of the United States for the Northern District of California. Affirmed.

Habeas corpus, sued out May 13, 1891, by a female subject of the emperor of Japan, restrained of her liberty and detained at San Francisco upon the ground that she should not be permitted to land in the United States.

The petitioner arrived at the port of San Francisco on the steamship *Belgic*, from Yokohama, Japan, on May 7, 1891. William H. Thornley, commissioner of immigration of the state of California, and claiming to act under instructions from and contract with the Secretary of the Treasury of the United States, refused to allow her to land; and the collector wrote to Thornley, approving his action.

Thereafter, on May 13, 1891, this writ of habeas corpus was issued to Thornley, and he made the following return thereon: "In obedience to the within writ I hereby produce the body of Nishimura Ekiu, as within directed, and return that I hold her in my custody by direction of the customs authorities of the port of San Francisco, Cal., under the provisions of the immigration act; that, by an understanding between the United States attorney and the attorney for petitioner, said party will remain in the custody of the Methodist Episcopal Japanese and Chinese Mission pending a final disposition of the writ." The petitioner remained at the mission house until the final order of the Circuit Court.

Afterwards, and before a hearing, the following proceedings took place: On May 16th the district attorney of the United States intervened in opposition to the writ of habeas corpus, insisting that the finding and decision of Thornley and the collector were final and conclusive, and could not be reviewed by the court. John L. Hatch, having been appointed on May 14th, by the Secretary of the Treasury, inspector of immigration at the port of San Francisco, on May 16th made the inspection and examination required by the act of March 3, 1891, c. 551, 26 Stat. 1084 (U. S. Comp. St. 1901, p. 1294), entitled "An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor," and refused to allow the petitioner to land, and made a report to the collector in the very words of Thornley's

<sup>22</sup> See, also, *Bogle v. Sherborne Local Board*, 46 J. P. 675 (1880); *Attorney General v. Great Western Ry. Co.*, 4 Ch. Div. 735 (1876).



report, except in stating the date of the act of Congress, under which he acted, as March 3, 1891, instead of August 3, 1882; and, on May 18th, Hatch intervened in opposition to the writ of habeas corpus, stating these doings of his, and that upon said examination he found the petitioner to be "an alien immigrant from Yokohama, empire of Japan," and "a person without means of support, without relatives or friends in the United States," and "a person unable to care for herself, and liable to become a public charge, and therefore inhibited from landing under the provisions of said act of 1891, and previous acts of which said act is amendatory," and insisting that his finding and decision were reviewable by the superintendent of immigration and the Secretary of the Treasury only.

At the hearing before the commissioner of the Circuit Court, the petitioner offered to introduce evidence as to her right to land; and contended that the act of 1891, if construed as vesting in the officers named therein exclusive authority to determine that right, was in so far unconstitutional, as depriving her of her liberty without due process of law; and that by the Constitution she had a right to the writ of habeas corpus, which carried with it the right to a determination by the court as to the legality of her detention, and therefore, necessarily, the right to inquire into the facts relating thereto.

The commissioner excluded the evidence offered as to the petitioner's right to land, and reported that the question of that right had been tried and determined by a duly constituted and competent tribunal having jurisdiction in the premises; that the decision of Hatch, as inspector of immigration, was conclusive on the right of the petitioner to land, and could not be reviewed by the court, but only by the commissioner of immigration and the Secretary of the Treasury; and that the petitioner was not unlawfully restrained of her liberty.

On July 24, 1891, the Circuit Court confirmed its commissioner's report, and ordered "that she be remanded by the marshal to the custody from which she has been taken, to wit, to the custody of J. L. Hatch, immigration inspector for the port of San Francisco, to be dealt with as he may find that the law requires, upon either the present testimony before him, or that and such other as he may deem proper to take." The petitioner appealed to this court.

Mr. Justice GRAY, after stating the case, delivered the opinion of the court.

As this case involves the constitutionality of a law of the United States, it is within the appellate jurisdiction of this court, notwithstanding the appeal was taken since the act establishing Circuit Courts of Appeals took effect. Act March 3, 1891, c. 517, § 5, 26 Stat. 827, 828, 1115 (U. S. Comp. St. 1901, p. 549).

It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its do-

minions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. *Vat. Law Nat. lib.* 2, §§ 94, 100; 1 *Phillim. Int. Law* (3d Ed.) c. 10, § 220. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom the Constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to declare war, and to provide and maintain armies and navies; and to make all laws which may be necessary and proper for carrying into effect these powers and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. *Const. art. 1, § 8*; *Head-Money Cases*, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798; *Chae Chan Ping v. U. S.*, 130 U. S. 581, 604-609, 9 Sup. Ct. 623, 32 L. Ed. 1068.

The supervision of the admission of aliens into the United States may be intrusted by Congress either to the Department of State, having the general management of foreign relations, or to the Department of the Treasury, charged with the enforcement of the laws regulating foreign commerce; and Congress has often passed acts forbidding the immigration of particular classes of foreigners, and has committed the execution of these acts to the Secretary of the Treasury, to collectors of customs, and to inspectors acting under their authority. See, for instance, *Act March 3, 1875, c. 141, 18 Stat. 477* (U. S. Comp. St. 1901, p. 1285); *Act Aug. 3, 1882, c. 376, 22 Stat. 214* (U. S. Comp. St. 1901, p. 1288); *Act Feb. 23, 1887, c. 220, 24 Stat. 414*; *Act Oct. 19, 1888, c. 1210, 25 Stat. 566* (U. S. Comp. St. 1901, p. 1294); as well as the various acts for the exclusion of the Chinese.

An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful. *Chew Heong v. U. S.*, 112 U. S. 536, 5 Sup. Ct. 255, 28 L. Ed. 770; *U. S. v. Jung Ah Lung*, 124 U. S. 621, 8 Sup. Ct. 663, 31 L. Ed. 591; *Wan Shing v. U. S.*, 140 U. S. 424, 11 Sup. Ct. 729, 35 L. Ed. 503; *Lau Ow Bew, Petitioner*, 141 U. S. 583, 12 Sup. Ct. 43, 35 L. Ed. 868. And Congress may, if it sees fit, as in the statutes in question in *U. S. v. Jung Ah Lung*, just cited, authorize the courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those facts may be intrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to

an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted. *Martin v. Mott*, 12 Wheat. 19, 31, 6 L. Ed. 537; *Railroad Co. v. Stimpson*, 14 Pet. 448, 458, 10 L. Ed. 535; *Benson v. McMahon*, 127 U. S. 457, 8 Sup. Ct. 1240, 32 L. Ed. 234; *In re Luis Oteiza y Cortes*, 136 U. S. 330, 10 Sup. Ct. 1031, 34 L. Ed. 464. It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law. *Murray v. Hoboken Co.*, 18 How. 272, 15 L. Ed. 572; *Hilton v. Merritt*, 110 U. S. 97, 3 Sup. Ct. 548, 28 L. Ed. 83. \* \* \*

Before the hearing upon the writ of habeas corpus, Hatch was appointed by the Secretary of the Treasury inspector of immigration at the port of San Francisco, and, after making the inspection and examination required by the act of 1891, refused to allow the petitioner to land, and made a report to the collector of customs, stating facts which tended to show, and which the inspector decided did show, that she was a "person likely to become a public charge," and so within one of the classes of aliens "excluded from admission into the United States" by the first section of that act. And Hatch intervened in the proceedings on the writ of habeas corpus, setting up his decision in bar of the writ.

A writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and, if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment. *Ex parte Bollman*, 4 Cranch, 75, 114, 125, 2 L. Ed. 554; *Coleman v. Tennessee*, 97 U. S. 509, 519, 24 L. Ed. 1118; *U. S. v. McBratney*, 104 U. S. 621, 624, 26 L. Ed. 869; *Kelley v. Thomas*, 15 Gray (Mass.) 192; *King v. Marks*, 3 East, 157; *Shuttleworth's Case*, 9 Q. B. 651.

The case must therefore turn on the validity and effect of the action of Hatch as inspector of immigration.

Section 7 of the act of 1891 establishes the office of superintendent of immigration, and enacts that he "shall be an officer in the Treasury Department, under the control and supervision of the Secretary of the Treasury." By section 8, "the proper inspection officers" are required to go on board any vessel bringing alien immigrants, and

to inspect and examine them, and may for this purpose remove and detain them on shore, without such removal being considered a landing, and "shall have power to administer oaths, and to take and consider testimony touching the right of any such aliens to enter the United States, all of which shall be entered of record." "All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury;" and the Secretary of the Treasury may prescribe rules for inspection along the borders of Canada, British Columbia, and Mexico, "provided that not exceeding one inspector shall be appointed for each customs district." \* \* \*

It was also argued that Hatch's proceedings did not conform to section 8 of the act of 1891, because it did not appear that he took testimony on oath, and because there was no record of any testimony or of his decision. But the statute does not require inspectors to take any testimony at all, and allows them to decide on their own inspection and examination the question of the right of any alien immigrant to land. The provision relied on merely empowers inspectors to administer oaths, and to take and consider testimony, and requires only testimony so taken to be entered of record.

The decision of the inspector of immigration being in conformity with the act of 1891, there can be no doubt that it was final and conclusive against the petitioner's right to land in the United States. The words of section 8 are clear to that effect, and were manifestly intended to prevent the question of an alien immigrant's right to land, when once decided adversely by an inspector, acting within the jurisdiction conferred upon him, from being impeached or reviewed, in the courts or otherwise, save only by appeal to the inspector's official superiors, and in accordance with the provisions of the act. Section 13, by which the Circuit and District Courts of the United States are "invested with full and concurrent jurisdiction of all causes, civil and criminal, arising under any of the provisions of this act," evidently refers to causes of judicial cognizance, already provided for, whether civil actions in the nature of debt for penalties under sections 3 and 4, or indictments for misdemeanors under sections 6, 8, and 10. Its intention was to vest concurrent jurisdiction of such causes in the Circuit and District Courts, and it is impossible to construe it as giving the courts jurisdiction to determine matters which the act has expressly committed to the final determination of executive officers.

The result is that the act of 1891 is constitutional and valid; the inspector of immigration was duly appointed; his decision against the petitioner's right to land in the United States was within the authority conferred upon him by that act; no appeal having been



taken to the superintendent of immigration, that decision was final and conclusive; the petitioner is not unlawfully restrained of her liberty; and the order of the Circuit Court is affirmed.<sup>23</sup>

Mr. Justice BREWER dissented.

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TOD v. WALDMAN.

Supreme Court of United States, 1924. 266 U. S. 113, 45 S. Ct. 85, 69 L. Ed. 195.

See, ante, p. 531, for a report of the case.

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DEBATE IN THE HOUSE OF LORDS, AUGUST 3, 1905, ON  
ALIENS' BILL.

Hansard, vol. 151, p. 7.

Lord Coleridge moved to omit the appeal by the immigrant to the immigration board, and to substitute "to the court of summary jurisdiction at the port, and that court shall, if they are satisfied that leave to land should not be withheld under this act, give leave to land, and any person aggrieved by an order, judgment, or determination of such court may appeal in manner provided by the summary jurisdiction acts to a court of quarter sessions." The substance of this amendment was to substitute a court of summary jurisdiction for the immigration board. In that he was following the proposals of the majority report of the commission, in which they recommended that the alien immigrant who, within two years of his arrival, was ascertained or was reasonably supposed to be under the various headings might be ordered by a court of summary jurisdiction to leave this country. Under the bill the decision would lie first of all with the immigrant officer, who, of course, would be a man of no judicial experience. The only appeal then was to an immigration board, consisting of three persons appointed by the Secretary of State.

<sup>23</sup> See *Lem Moon Sing v. United States*, 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082 (1895), where the administrative jurisdiction was held to be exclusive with reference to the right of re-entry of an alien who had been domiciled in the United States, and had temporarily left the country.

The Chinese exclusion acts provided for a judicial hearing (*United States v. Jung Ah Lung*, 124 U. S. 621, 8 Sup. Ct. 663, 31 L. Ed. 591, [1888]), until by Act Aug. 18, 1894, c. 301, 28 Stat. 390 (U. S. Comp. St. 1901, p. 1303), the administrative determination was made conclusive as to all aliens; but this did not apply to the provision for the removal of a Chinese person found to be unlawfully in the United States. *Chin Bak Kan v. U. S.*, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121 (1902).

That an alien may be summarily deported, see *Yamataya v. Fisher*, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721 (1903).

The questions which this board would have to decide were very grave and very intricate. They would have to decide on the supposed lunacy of an immigrant; they would have to decide on the very nice question as to whether the offense which was supposed to have been committed was or was not of a political character, a matter which called for the exercise of a judicial decision; they would also have to decide under the succeeding subsection whether or not he was coming to this country to avoid prosecution on religious or political grounds, another very nice question. All these questions would have to be decided, according to the provisions of the bill, by a board which had no judicial character at all. There was no provision in the bill to insure the proceedings before this immigration board being on oath. They knew that the Secretary of State might provide rules, but they did not know what those rules would be. The amendment would not in any sense interfere with the main object of the bill. It was only an administrative alteration, and did not in any way go to the root and principle of the bill; and as it had been recommended by the commission he hoped the noble and learned Lord who presided over that body would give him his support. He thought that the alien, before he was prevented from landing, should know that he had been considered an undesirable alien by a proper court judicially constituted.

Lord Belper hoped the House would not accept the amendment.

\* \* \* The board would have no question of law to deal with, but questions of fact, of which absolute legal proof might be impossible. The Secretary of State had insured, as far as he could, that one of those who were appointed on the board should be a magistrate, and it was intended that as far as possible a magistrate should be the chairman. The two other members were to be, as far as could be arranged, men of business and administrative experience. If the amendment of the noble and learned Lord were carried, it would make the bill practically unworkable. In the first instance the matter would have to go to a court of summary jurisdiction; but if there was to be an appeal to quarter sessions, as in all cases of dispute there would be, that might mean a delay of two or three months. What was to be done with the alien who was landed for the purpose of this inquiry during that time? It would make the bill unworkable if the decision in his case were to be delayed for any such length of time as that. For that reason, and because His Majesty's government thought the body suggested by the bill would be a proper one for the purpose, he could not accept the amendment.

The proposed amendment was rejected by a vote of 68 to 16.

SECTION 62.—ADVERSE FINALITY—QUESTIONS OF LAW  
OR MIXED QUESTIONS OF LAW AND FACT

## 1. FOREIGN RELATIONS

NORTH GERMAN LLOYD S. S. CO. v. HEDDEN, Collector.  
SAME v. MAGONE, Collector.

Circuit Court of United States, D. New Jersey, 1890. 43 F. 17.

WALES, J. The plaintiff, a duly organized corporation under the laws of the Hanseatic republic of Bremen, which is a part of the German empire, is the owner of a line of ocean steamships, plying regularly between the ports of Bremen and New York, and brings these actions, under section 2931, Rev. St. (U. S. Comp. St. 1901, p. 1933), to recover the amount of certain tonnage dues, alleged to have been unlawfully collected from said ships during the period extending from June 26, 1884, to July 28, 1888, and while the defendants were successively collectors of customs at the last-named port. The vessels cleared from Bremen for New York via Southampton, Eng., stopping at or near the latter place temporarily, to discharge cargo and passengers, and to take on board additional cargo, passengers, and mails. The consignees of the vessels paid the dues, in every instance, under protest, and the plaintiff appealed to the Secretary of the Treasury, and finally, at the suggestion of the latter officer and with the concurrence of the department of justice, brought these actions to determine the authority of the defendants. \* \* \*

By article 9 of the treaty of December 20, 1827, between the United States and the Hanseatic republics, "the contracting parties \* \* \* engage mutually not to grant any particular favor to other nations, in respect of commerce and navigation, which shall not immediately become common to the other party." Public Treaties, 400. Article 9 of the Prussian-American treaty of May 1, 1828 (Pub. Treaties, 656), contains a like stipulation. These treaties have been held by both the American and German governments to be valid for all Germany. On the 26th of January, 1888, the President, in virtue of the authority vested in him by section 11 of the act of June 19, 1886, c. 421, 24 Stat. 81 (U. S. Comp. St. 1901, p. 2850), issued his proclamation, wherein, after reciting that he had received satisfactory proof that no tonnage or lighthouse dues, or any equivalent tax or taxes whatever, are imposed upon American vessels entering the ports of the German empire, either by the imperial government or by the governments of the German maritime states, and that vessels belonging to the United

States are not required, in German ports, to pay any fee or due of any kind or nature, or any import duty higher or other than is payable by German vessels or their cargoes, did "declare and proclaim that from and after the date of this my proclamation shall be suspended the collection of the whole of the duty of six cents per ton \* \* \* upon vessels entered in the ports of the United States from any of the ports of the empire of Germany, \* \* \* and the suspension hereby declared and proclaimed shall continue so long as the reciprocal exemption of vessels belonging to citizens of the United States and their cargoes shall be continued in the said ports of the empire of Germany, and no longer."

The commissioner of navigation, in his circular letter No. 19, dated February 1, 1888, and approved by the Secretary of the Treasury, addressed to the collectors of customs and others, decided that the President's proclamation does not apply to vessels which entered before the date of the proclamation, and that only those German vessels "arriving directly from the ports of the German empire may be admitted under the proclamation without the payment of the dues therein mentioned." The commissioner of navigation claims authority to make this decision by virtue of section 3 of the act of Congress of July 5, 1884, c. 221, 23 Stat. 119 (U. S. Comp. St. 1901, p. 199), entitled "An act to constitute a bureau of navigation in the Treasury Department," which reads as follows: "That the commissioner of navigation shall be charged with the supervision of the laws relating to the admeasurement of vessels, and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation, growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refunding of such tax when collected erroneously or illegally, his decision shall be final."

The plaintiff's vessels were German vessels, and on the 19th day of June, 1886, and thereafter until now, the government of Germany exacted no tonnage tax or taxes whatever on vessels of the United States arriving in German ports. \* \* \*

As to the time when the act of June 19, 1886, went into operation, whether immediately from and after the date of its approval, or not until the date of the President's proclamation, and also whether the voyages of the plaintiff's vessels from Bremen to New York must be made "directly," and without stoppage at an intermediate port, in order to be exempted from the imposition and payment of tonnage dues, the decision of these questions by the commissioner of navigation must be held to be conclusive, unless so much of section 3 of the act of July 5, 1884, which makes his decision final in such matters, is unconstitutional. Much learning and ability have been employed by plaintiff's counsel to establish the invalidity of this portion of the act, which invests a department officer with such unlimited judicial



power, and by which he is enabled to decide all contests in relation to alleged illegal dues, *ex parte*, and absolutely. On the other hand, the labor and responsibility of the court have been increased by the omission of the defendant's counsel to furnish any assistance towards the solution of the questions, and permitting them to pass *sub silentio*. The subject, however, is not *res integra*. In *Cary v. Curtis*, 3 How. 236, 11 L. Ed. 576, the Supreme Court had under consideration the constitutionality of the third section of the act of Congress of March 3, 1839, entitled "An act making appropriations for the civil and diplomatic expenses of the government for the year 1839," by which the Secretary of the Treasury was authorized to finally decide when more duties had been paid to any collector of customs, or to any person acting as such, than the law required, and to draw his warrant in favor of the person or persons entitled for a refund of the amounts so overpaid. The opinion of the court discusses very ably and at much length the questions involved in that case.

A few sentences taken from the opinion will indicate the grounds upon which the validity of the act of 1839 was sustained: "We have no doubts [says the court] of the objects or the import of that act. We cannot doubt that it constitutes the Secretary of the Treasury the source whence instructions are to flow; that it controls both the position and the conduct of the collectors of the revenue; that it has denied to them any right or authority to retain any portion of the revenue for purposes of contestation or indemnity; has ordered and declared those collectors to be the mere organs of receipt and transfer, and has made the head of the Treasury Department the tribunal for the examination of claims for duties said to have been improperly paid. \* \* \* It is contended, however, that the language and the purposes of Congress, if really what we hold them to be declared in the statute of 1839, cannot be sustained, because they would be repugnant to the Constitution, inasmuch as they would debar the citizen of his right to resort to the courts of justice. \* \* \* The objection above referred to admits of the most satisfactory refutation. This may be found in the following positions, familiar in this and in most other governments, *viz.* that the government, as a general rule, claims an exemption from being sued in its own courts. That although, as being charged with the administration of the laws, it will resort to those courts as means of securing this great end, it will not permit itself to be impleaded therein, save in instances forming conceded and express exceptions. Secondly, in the doctrine, so often ruled in this court, that the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited,

concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely. It follows, then, that the courts created by statute must look to the statute as the warrant for their authority. \* \* \* The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law. \* \* \* The courts of the United States can take cognizance only of subjects assigned to them expressly or by necessary implication; a fortiori, they can take no cognizance of matters that by law are either denied to them, or expressly referred ad aliud examen."

This exposition of the origin and extent of the jurisdiction of the courts of the United States was reaffirmed in *Sheldon v. Sill*, 8 How. 449, 12 L. Ed. 1147, where it was held that courts created by statute can have no jurisdiction but such as the statute confers. The right given by section 2931, Rev. St., to sue for overpaid dues is taken away by the act of July 5, 1884, and the power to determine controversies arising from alleged exactions by collectors is deposited with the commissioner of navigation. Such is the effect of the decisions just cited, and which, as long as they are not overruled by the tribunal which made them, must be obeyed as the law of the land. The authorities referred to by plaintiff's counsel are cases where department officers, in making regulations to be observed by their subordinates, exceeded their statutory power, but in no one instance was it pretended that the officer was clothed with the power to make a final decision in contested matters. It was perhaps unnecessary, in view of *Cary v. Curtis*, and *Sheldon v. Sill*, that I should have done more than acquiesce in the doctrines there announced, and support the validity of the act of July 5, 1884, without further discussion, but the large amount of money involved in the present actions, and the earnestness and force with which the plaintiff's claims have been pressed, have induced me to make a more extended presentation of them than was at first designed. It must be borne in mind that this court is not called on to express any opinion on the justice or expediency of placing such unlimited power in the hands of the commissioner of navigation as is conferred by the act of July 5, 1884. The duty of the court is to discover whether the act is in conflict with the Constitution, and, on being satisfied that it is not, to judge accordingly. To pursue any other course would be not only extrajudicial, but also improper, in assuming to criticise the wisdom of Congress in making the law. Neither is the court required to say whether the commissioner of navigation is or is not correct in his interpretation of the law. Congress has seen fit to constitute him the final arbiter in certain disputes, and Congress alone can supply a

remedy for any wrong which may have arisen from his construction of the law relating to the collection of tonnage due.

Let judgment be entered in each case for the defendant.<sup>24</sup>

### LIDLAW v. ABRAHAM, Collector.

Circuit Court of United States, D. Oregon, 1890. 43 Fed. 297.

DEADY, J. The plaintiff, James Laidlaw, doing business as "James Laidlaw & Co.," brings this action against Hyman Abraham, collector of customs at the port of Portland, in the district of Wallamet to recover the sum of \$793.50, alleged to have been wrongfully exacted by the defendant from the British ship *Largo Law*, as a tonnage tax. \* \* \*

The only other point made in support of the demurrer is that the decision on the appeal to the Secretary was, under Act July 5, 1884, c. 221, 23 Stat. 118 (U. S. Comp. St. 1901, p. 199), in fact made by the commissioner of navigation, and is by said act made final, and is therefore a bar to this action.

This act is entitled "An act to constitute a bureau of navigation in the Treasury Department." The commissioner created by it is charged, "under the direction of the Secretary of the Treasury" with many duties concerning "the commercial, marine, and merchant seamen of the United States;" and, by section 3 thereof, "with the supervision of the laws relating to the admeasurement of vessels and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refund of such tax when collected erroneously or illegally, his decision shall be final."

At first blush it may appear that this provision in the Act of 1884 repealed so much of sections 2931, 3011, Rev. St. (U. S. Comp. St. 1901, pp. 1933, 1985), as gives the person paying such illegal tax the right of redress in the courts, after an unsuccessful appeal to the department. But, on reflection, I am satisfied that the word "final" is used in this connection with reference to the department, of which the commissioner is generally a subordinate part.

In my judgment, the purpose of the provision is to relieve the head of the department from the labor of reviewing the action of the commissioner in these matters, to sidetrack into the bureau of navigation the business of rating vessels for tonnage duties, and deciding questions arising on appeals from the exaction of the same by collectors. The appeal is still taken to the Secretary of the Treasury, as provided

<sup>24</sup> See Carnegie Endowment of International Peace: "The treaties of 1785, 1799, and 1828 between the United States and Prussia." The diplomatic correspondence does not discuss the constitutional question.

in section 2931, but goes to the commissioner for decision, whose action is "final" in the department, as it would not be but for this provision of the statute.

This being so, and nothing appearing to the contrary, it follows that the right of action given to the unsuccessful appellant in such cases is not taken away. The appeal to the department has simply been decided by the commissioner, rather than the Secretary, and, that having been adverse to the plaintiff, his right of action against the collector attaches at once.

And, even if it were plain that Congress in the passage of this act intended to deprive the plaintiff of all redress in the courts, might he not in good reason claim that the act is so far unconstitutional and void, as being contrary to the fifth amendment, which declares that no person shall be deprived of his "property without due process of law?"

The demurrer is overruled.

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## SECTION 63.—ADVERSE FINALITY—QUESTIONS OF LAW

### 2. GOVERNMENT BOUNTY

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#### UNITED STATES *ex rel.* RIVERSIDE OIL CO. *v.* HITCHCOCK.

Supreme Court of United States, 1903. 190 U. S. 316, 23 Sup. Ct. 698.  
47 L. Ed. 1074.

In error to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of that District denying a petition for a writ of mandamus to compel the Secretary of the Interior to vacate an order rejecting a selection of public land. Affirmed.

[The statement of facts is here omitted.]

Mr. Justice FRICKHAM delivered the opinion of the court.

We have set out in the statement of facts, at very great length, a large portion of the contents of the petition and answer in this case. It has been done for the purpose of showing by the record itself the questions of law arising therefrom. Upon a perusal of the record it appears that those questions are not merely formal ones, nor are they so plain as not to require the careful judgment of any tribunal to which they may be referred for decision. Their solution was properly submitted to the Land Department, which had full and complete jurisdiction over the matters arising under Act June 4, 1897, c. 2, 30 Stat. 34 (U. S. Comp. St. 1901, p. 1538), and it thereby became the duty of the officers of that department to decide them.



As is said in *Knight v. United Land Ass'n*, 142 U. S. 161, 12 Sup. Ct. Rep. 258, 35 L. Ed. 974: "The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands."

Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling, and care and disposition of the public lands. Neither an injunction nor mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion. *Marquez v. Frisbie*, 101 U. S. 473, 25 L. Ed. 800; *Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62; *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 32 L. Ed. 354, 9 Sup. Ct. Rep. 12; *United States ex rel. Redfield v. Windom*, 137 U. S. 636, 11 Sup. Ct. 197, 34 L. Ed. 811.

In *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 559, 600, it was held that, in general, the official duties of the head of one of the executive departments, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government in the administration of the various and important concerns of his office is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress under which he is from time to time required to act.

That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make.

Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility as well as the power rests with the Secretary, uncontrolled by the courts.

Neither the case of *Roberts v. United States*, 176 U. S. 221, 20 Sup. Ct. 376, 44 L. Ed. 443, nor that of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90, decides anything opposing these views.

In the *Roberts Case* it was simply decided that the duty of the Treasurer to pay the money in question in that case was ministerial in its nature, and should have been performed by him on demand, and that, therefore, mandamus was the proper remedy for his failure to do it.

In the *McAnnulty Case* it was held that the order of the Postmaster General to the postmaster in the city of Nevada, not to deliver the mail to the relator, was not a justification for such refusal, because the order was given without authority of law, and the postmaster could, notwithstanding such order, be compelled by mandamus to do his duty and deliver the mail. The case has no relevancy to the one in hand.

We are so clearly of opinion that the decision of the defendant in this case was judicial in its nature that further argument upon the subject is needless.

The judgment of the Court of Appeals of the District of Columbia is affirmed.<sup>25</sup>

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UNITED STATES ex rel. DUNLAP v. BLACK, Commissioner of Pensions. (No. 991.) SAME ex rel. ROSE v. SAME. (No. 992.) SAME ex rel. MILLER v. SAME. (No. 993.)

Supreme Court of United States, 1888. 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354.

Errors to the Supreme Court of the District of Columbia.

BRADLEY, J. These cases were argued together, but it will be convenient to consider them separately, in the order in which they stand on the docket.

No. 991 was an application by Oscar Dunlap, the relator, to the Supreme Court of the District of Columbia, for a writ of mandamus to be directed to the respondent, Black, as Commissioner of Pensions,

<sup>25</sup> See, also, *U. S. v. Fisher*, 223 U. S. 683, 32 S. Ct. 356, 56 L. Ed. 610 (1912).  
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commanding him to reissue to the relator his pension certificate for \$25 per month from June 6, 1866; \$31.25 per month from June 4, 1872; \$50 per month from June 4, 1874; and \$72 per month from June 17, 1878—first deducting all sums paid relator under previous pensions.

By Act March 3, 1873, c. 234, § 4, 17 Stat. 569 (Rev. St. § 4698 [U. S. Comp. St. 1901, p. 3235]), it was provided that a pension of \$31.25 per month should be allowed to all persons who, while in the military or naval service, had lost their sight, or both hands or both feet, or had been permanently and totally disabled, so as to require the regular aid and attendance of another person; and a pension of \$24 per month to those who had lost one hand and one foot; and \$18 per month to those who had lost either one hand or one foot; and other less pensions for lesser injuries—any increase of pension to commence from the date of the examining surgeon's certificate. By Act June 18, 1874, c. 298, 18 Stat. 78 (Supp. Rev. St. 39 [U. S. Comp. St. 1901, p. 3236]), it was provided that, in cases of blindness or loss of both hands or both feet, or total helplessness, requiring the regular and personal aid of another person, the pension should be increased from \$31.25 to \$50 per month. By Act Feb. 28, 1877, c. 73, 19 Stat. 264 (Supp. Rev. St. 282 [U. S. Comp. St. 1901, p. 3236]), it was provided that those who had lost one hand and one foot should be entitled to a pension for each of such disabilities at the rate of existing laws, which made the total pension \$36 per month. The relator, in April, 1877, applied for the benefit of this law, and it was granted to him. By Act June 16, 1880, c. 236, 21 Stat. 281 (Supp. Rev. St. 560 [U. S. Comp. St. 1901, p. 3237]), it was enacted that all those then (at the date of the act) receiving a pension of \$50 per month under the act of June 18, 1874, should receive \$72 per month from June 17, 1878.

After the last act was passed, the relator applied for the increase allowed by it. The Commissioner of Pensions, being of opinion that he did not come within its terms, rejected the application, but granted him a certificate for a pension of \$50 per month under the act of 1874, to be received from May 25, 1881, the date of his medical examination. The petition for mandamus sets out the decision of the Commissioner in full, in which it is conceded that the relator has become permanently disabled. The following is an extract from the decision, to-wit:

“Washington, D. C., October 15, 1887.

“In this case the application of the claimant for rerating and for increase will be allowed at \$50 per month from May 25, 1881, the date of the first medical examination under the claimant's application of June 26, 1880. This rating is allowed under the act of June 18, 1874; it sufficiently appearing by the evidence in this case that the claimant has lost both a hand and a foot, and at the same time has been so additionally injured in the head as, from a period prior to the rerating or increase in this case, to render him totally and

permanently helpless, requiring from thence until now the regular personal aid and attendance of another person. The reason why the claimant's rating is not advanced to \$72 per month is that he was not on the 16th of June, 1880 [the date of the act] receiving pension at the rate of \$50 per month, nor was he entitled to receive a pension of \$50 per month at that date, for the reason that, while the degree of helplessness which has been shown was that contemplated by the law, the claimant himself (neither on his own motion, nor under the guidance of those who are legally responsible for his actions in this claim) had not made application to be rated in pursuance of the act of June 18, 1874, but, on the contrary thereof, had asked to be rated and had been rated at \$36 per month, under the act of February 28, 1877."

The decision proceeds to discuss further the reasons for the conclusion to which the commissioner had come.

The relator, by his counsel, strenuously contends that the concession made by the commissioner with regard to the disability of the relator shows that it was his clear duty to have granted a certificate for the larger pension of \$72 per month. The following passage in the petition for mandamus shows the position taken by the relator: "And your relator further says that the respondent has thus expressly found the facts in your relator's case to be (1) that while your relator was in the military service \* \* \* he sustained such wounds and injuries as resulted in the loss of his right hand and right foot, and at the same time sustaining injury to the head; (2) that your relator was thereby rendered 'totally and permanently helpless, requiring from thence till now the regular aid and attendance of another person'; and (3) that your relator applied to the Commissioner of Pensions on June 26, 1880, for pension on account thereof. And your relator says that upon this finding of the facts whether he is entitled to a rerating and an increase of pension from date of discharge, so as to give unto him a pension commensurate with his disabilities so found to exist by the respondent, is a question of law; and that it does not lie in the discretionary power of the respondent, as Commissioner of Pensions, to deny or in any wise abridge his rights with respect thereto."

This extract shows the theory of the petitioner, and the doctrine which he invokes in support of his application. We have been more full in stating the facts of the case in order that the legal grounds on which that application is based may clearly appear. The case does not require an extended discussion. The questions of law on which it depends have been closed by repeated decisions of this court.

The amenability of an executive officer to the writ of mandamus, to compel him to perform a duty required of him by law, was discussed by Chief Justice Marshall in his great opinion in the case of *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60; and the radical distinction was there pointed out between acts performed by such



officers in the exercise of their executive functions, which the Chief Justice calls political acts, and those of a mere ministerial character; and the rule was distinctly laid down that the writ will not be issued in the former class of cases, but will be issued in the latter. In that case President Adams had nominated, and the Senate had confirmed, Marbury as a justice of the peace of the District of Columbia; and a commission in due form was signed by the President appointing him such justice, and the seal of the United States was duly affixed thereto by the Secretary of State; but the commission had not been handed to Marbury when the offices of the government were transferred to the administration of President Jefferson. Mr. Madison, the new Secretary of State, refused to deliver the commission, and a mandamus was applied for to this court to compel him to do so. The court held that the appointment had been made and completed, and that Marbury was entitled to his commission, and that the delivery of it to him was a mere ministerial act, which involved no further official discretion on the part of the Secretary, and could be enforced by mandamus. But the court did not issue the writ, because it would have been an exercise of original jurisdiction which it did not possess.

While this opinion will always be read by the student with interest and profit, it has not been considered as invested with absolute judicial authority, except on the question of the original jurisdiction of this court. The decision on this point has made it necessary for parties desiring to compel an officer of the government to perform an act in which they are interested to resort to the highest court of the District of Columbia for redress. It has been held in numerous cases, and was held after special discussion in the cases of *Kendall v. U. S.*, 12 Pet. 524, 9 L. Ed. 1181, and *U. S. v. Schurz*, 102 U. S. 378, 26 L. Ed. 167, that the former Circuit Court of the District, and the present Supreme Court of the District, respectively, were invested with plenary jurisdiction on the subject. On this point there is no further question.

The two leading cases which authoritatively show when the Supreme Court of the District may, and when it may not, grant a mandamus against an executive officer, are the above-cited case of *Kendall v. U. S.*, 12 Pet. 524, 9 L. Ed. 1181,<sup>26</sup> and *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 359.<sup>27</sup> The subsequent cases have followed the principles laid down in these, and do little more than illustrate and apply them.

In the former case the mandamus was granted, and the decision was affirmed by this court. The case was shortly this: Stockton & Stokes, as contractors for carrying the mails, had certain claims against the government for extra services, which they insisted should be credited in their accounts, and a controversy arose between them and

<sup>26</sup> See ante, p. 630.

<sup>27</sup> See ante, p. 460.

the Post-Office Department on the subject. Congress passed an act for their relief, by which the Solicitor of the Treasury was authorized and directed to settle and adjust their claims, and make them such allowances as upon a full examination of all the evidence might seem to be equitable and right; and the Postmaster General was directed to credit them with whatever sums the Solicitor should decide to be due them. The Solicitor, after due investigation, made his report, and stated the sums due to Stockton & Stokes on the claims made by them; but the Postmaster General, Mr. Kendall, refused to give them credit as directed by the law. This the court held he could be compelled to do by mandamus, because it was simply a ministerial duty to be performed, and not an official act requiring any exercise of judgment or discretion. This court, through Mr. Justice Thompson, said: "The act required by the law to be done by the Postmaster General is simply to credit the relators with the full amount of the award of the Solicitor. This is a precise, definite act, purely ministerial, and about which the Postmaster General had no discretion whatever. The law upon its face shows the existence of accounts between the relators and the Post-Office Department. No money was required to be paid, and none could be drawn from the treasury without further legislative provision, if this credit should overbalance the debit standing against the relators. But this was a matter with which the Postmaster General had no concern. He was not called upon to furnish the means of paying such balance, if any should be found. He was simply required to give the credit. This was not an official act in any other sense than being a transaction in the department where the books and accounts were kept; and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise; all that is shut out by the direct and positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act."

In the other case (*Decatur v. Paulding*) the mandamus was refused by the Circuit Court, and that decision was also affirmed by this court. The case was this: On the 3d of March, 1837, Congress passed an act giving to the widow of any officer who had died in the naval service a pension equal to half of his monthly pay from the time of his death until her death or marriage. On the same day Congress passed a resolution granting a pension to Mrs. Decatur, widow of Stephen Decatur, for five years, commencing June 30, 1834, and the arrearages of the half pay of a post captain from Commodore Decatur's death to the 30th of June, 1834. Mrs. Decatur applied for and received her pension under the general law, with a reservation of her rights under the resolution, claiming the pension granted by that also. The Secretary of the Navy, acting under the opinion of the Attorney General, decided that she could not have

both. Thereupon she applied for a mandamus to compel the Secretary to comply with the resolution in her favor. Chief Justice Taney delivered the opinion of the court, and laid down the law in terms that have never been departed from. We can only quote a single passage from this opinion.

The Chief Justice says: "The duty required by the resolution was to be performed by him [the Secretary of the Navy] as the head of one of the executive departments of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act. If he doubts, he has a right to call on the Attorney General to assist him with his counsel; and it would be difficult to imagine why a legal adviser was provided by law for the heads of the departments, as well as for the President, unless their duties were regarded as executive, in which judgment and discretion were to be exercised. If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department; and, if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment, in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties. The case before us illustrates these principles, and shows the difference between executive and ministerial acts."

The Chief Justice then goes on to show that the decision of the Secretary of the Navy in that case was entirely executive and official in its character, and that in this respect the case differed entirely from that of *Kendall v. U. S.*

The principle of law deducible from these two cases is not difficult to enounce. The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute or otherwise, a mere ministerial duty is imposed upon them—that

is, a service which they are bound to perform without further question—then, if they refuse, a mandamus may be issued to compel them. Judged by this rule, the present case presents no difficulty. The Commissioner of Pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the Secretary of the Interior, as evidenced by his signature of the certificate. Whether, if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate power over the Commissioner, and no right to review his decision. That decision, and his action taken thereon, were made and done in the exercise of his official functions. They were by no means merely ministerial acts.

The decisions of this court, which have been rendered since the cases referred to, corroborate and confirm all that has been said. The following are the most important, to wit: *Brashear v. Mason*, 6 How. 92, 12 L. Ed. 357; *U. S. v. Guthrie*, 17 How. 284, 15 L. Ed. 102; *Commissioner v. Whiteley*, 4 Wall. 522, 18 L. Ed. 335; *Georgia v. Stanton*, 6 Wall. 50, 18 L. Ed. 721; *Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62; *U. S. v. Schurz*, 102 U. S. 378, 26 L. Ed. 167; *Butterworth v. Hoe*, 112 U. S. 50, 5 Sup. Ct. 25, 28 L. Ed. 656. In the two last cases cited, the mandamus was granted; and they were cases in which it was held that a mere ministerial duty was to be performed by the officer.

In *U. S. v. Schurz* the question related to a patent for land claimed by a pre-emptor. All the proceedings had been gone through, the right of the applicant had been affirmed, the patent had been made out in the land office, signed by the President, sealed with the land office seal, countersigned by the recorder of the land office, recorded in the proper book, and transmitted to the local land officers for delivery; but delivery was refused because instructions had been received from the Commissioner to return the patent. The plea was that it had been discovered that the lands belonged to a town site. The court held that this was an insufficient plea; that the title had passed to the applicant, and he was entitled to his patent, subject to any equity which other parties might have to the land, or to a proceeding for setting the patent aside; and that the duty of the Commissioner or Secretary of the Interior had become a mere ministerial duty to deliver the instrument, as was held in *Marbury v. Madison*, in relation to the commission of Marbury as justice of the peace. Of course, this case is entirely different from the case now under consideration.

The case of *Butterworth v. Hoe* was very similar in principle to that of *U. S. v. Schurz*. The Commissioner of Patents had decided in favor of the right of one Gill, an applicant for a patent, in a case of interference, and adjudged that a patent should issue to his as-



signs accordingly. An appeal was taken to the Secretary of the Interior, who reversed the decision of the Commissioner. The latter thereupon, and for that reason, refused to issue a patent. It was a question whether an appeal lay to the Secretary of the Interior, and this court held that it did not, and that he had no jurisdiction in the matter. The court, therefore, held that the patent ought to be issued in accordance with the decision of the Commissioner, and that the mere issue of the patent was a ministerial matter for which a mandamus would lie. This case, like that of *U. S. v. Schurz*, is unlike the present. All deliberation had ceased; the right of Gill, the applicant, was adjudged; there was nothing to be done but to deliver to the party the documentary evidence of his title. That was a mere ministerial matter. We think that the mandamus was properly refused, and the judgment of the Supreme Court of the District is affirmed.

No. 992 is similar in all essential respects to the preceding, and the decision must be the same. Judgment affirmed.

No. 993 differs materially from Nos. 991 and 992. Charles R. Miller, the relator, having made an unsuccessful application to the Commissioner of Pensions for an increase of his pension, finally appealed to the Secretary of the Interior, and in his petition for mandamus says as follows, to wit:

"That the Secretary, upon a personal, careful inspection of the record, and all the evidence filed therein in his case, and on due consideration thereof, made and rendered the following official decision: 'Department of the Interior, Washington, D. C., February 12, 1885. The Commissioner of Pensions—Sir: Herewith are returned the papers in the pension claim (certificate No. 55,356) of Charles R. Miller. It appears from the papers that Mr. Miller's claim was before this department on the 6th inst., and it was held that the pensioner is greatly disabled, and it is evident from the papers in his case that he is utterly unable to do any manual labor, and he is therefore entitled to \$30 per month under the act of March 3, 1883, which has been allowed him by your office. Since the departmental decision above referred to, the papers in the claim have been carefully reconsidered by the department, and a personal examination of the pensioner made; and it satisfactorily appears that he is unable to put on his shoe and stocking on the foot of his injured leg, for the reason that the nearest point that can be reached by hand from foot is 23 inches, and for the further reason that from "necrosis of the lower vertebræ of spine, producing anchylosis of the spinal column and destruction of some of the spinal nerves," he is unable to bend his back. After a careful review of all the facts in this case, the department is constrained to think that the pensioner comes under the meaning of the laws granting pensions to those persons who require aid and attendance. The decision of the 6th inst. is therefore overruled. Very respectfully, H. M. Teller, Secretary.'

"And your orator avers that the said official decision of the Sec-

retary of the Interior, so made as aforesaid, was a final adjudication of his claim in his favor, and conclusively establishes his right under the laws to be rerated at \$25 per month from June 6, 1866; \$31.25 per month from June 4, 1872; \$50 per month from June 4, 1874; and \$72 per month from June 17, 1878—and to be paid the difference monthly between these sums and what has been allowed him; and all that remained for the Commissioner of Pensions to do in the premises was the simple ministerial duty of accordingly carrying the said final official decision of the Secretary into execution."

The petition goes on to state that the former Commissioner of Pensions refused to carry out the Secretary's decision to its full extent, and that the present Commissioner, the respondent, still refuses. If, as the petition suggests, the Commissioner of Pensions refuses to carry out the decision of his superior officer, there would seem to be *prima facie* ground for at least calling upon him to show cause why a mandamus should not issue. This was all that the petitioner asked, and this the court refused.

As a general rule, when a superior tribunal has rendered a decision binding on an inferior, it becomes the ministerial duty of the latter to obey it and carry it out. So far as respects the matter decided, there is no discretion or exercise of judgment left. This is the constant course in courts of justice. The appellate court will not hesitate to issue a mandamus to compel obedience to its decisions. The appellate tribunal in the present case is the Secretary of the Interior, who has no power to enforce his decisions by mandamus, or any process of like nature; and therefore a resort to a judicial tribunal would seem to be necessary, in order to afford a remedy to the party injured by the refusal of the Commissioner to carry out his decision.

But it is suggested that removal of the contumacious subordinate from office, or a civil suit brought against him for damages, would be effectual remedies. We do not concur in this view. A suit for damages, if it could be maintained, would be an uncertain, tedious, and ineffective remedy, attended with many contingencies, and burdened with onerous expenses. Removal from office would be still more unsatisfactory. It would depend on the arbitrary discretion of the President, or other appointing power, and is not such a remedy as a citizen of the United States is entitled to demand. We think that the case suggested by the petition is one in which it would be proper for the court to interfere by mandamus. Whether it will turn out to be such, when all the circumstances are known, can be ascertained by a rule to show cause; and such a rule, we think, ought to have been granted.

The judgment of the court below is therefore reversed, and the cause remanded, with instructions to grant a rule to show cause as applied for by the petitioner.

Judgments will be entered separately in the several cases.

## SECTION 64.—ADVERSE FINALITY—QUESTIONS OF LAW

3. GOVERNMENTAL SERVICE<sup>28</sup>

## BATES &amp; GUILD CO. v. PAYNE, Postmaster General.

Supreme Court of United States, 1904. 194 U. S. 106, 24 S. Ct. 595, 48 L. Ed. 894.

Appeal from the Court of Appeals of the District of Columbia to review a decree which reversed a decree of the Supreme Court of the District, enjoining the Postmaster General from enforcing an order denying the admission to the mails of a publication of complainant as second-class mail matter, and dismissed the bill. Affirmed.

This was a bill to compel the recognition by the Postmaster General of the right of the plaintiff corporation to have a periodical publication, known as *Masters in Music*, received and transmitted through the mails as matter of the second class, and to enjoin defendant from enforcing an order, theretofore made by him, denying it entry as such. This case took the same course as the preceding ones.

Mr. Justice BROWN delivered the opinion of the court.

The first number of *Masters in Music* was issued in January, 1903, and an application was immediately made to the Postmaster General for its admission to the mails as second-class mail matter. The application was denied, and plaintiff immediately, and before the issue of another number, filed this bill. The publication purports to be a "monthly magazine," salable at 20 cents per number, and to subscribers at \$2 a year. The first number is devoted to the works of Mozart and contains a portrait, a biography of four pages, an essay of ten pages upon his art, and thirty-two pages of his music. The preliminary page contained a notice to the effect that "*Masters in Music* will be unlike any other musical magazine. Each monthly issue, complete in itself, will be devoted to one of the world's great musicians, giving thirty-two pages of engraved piano music, which will comprise those compositions or movements that represent the composer at his best, with editorial notes suggesting the proper interpretation; a beautiful frontispiece portrait, a life, and estimates of

<sup>28</sup> As to fiscal determinations, see W. E. Hotchkiss, *The Judicial Work of the Comptroller of the Treasury*, Cornell Studies in History and Political Science, vol. III; O. R. McGuire, *U. S. Accounting Officers and Judicial Precedents*, 19 Ill. Law Rev. 523; A. Langeluttig, *The Department of Justice of the United States* (1927), ch. 13, *The Attorney General and the Comptroller General*.

his genius and place in art, chosen from the writings of the most eminent musical critics. The text will thus constitute an interesting and authoritative monthly lesson in musical history; its selections of music will form a library of the world's musical masterpieces, and all at slight cost. \* \* \* The announcement of the contents of the February issue, which will treat of Chopin, will be found on another page."

The Postmaster General placed his refusal to allow this magazine to be transmitted as second-class mail matter upon the ground that each number was complete in itself; had no connection with other numbers save in the circumstance that they all treated of masters in music, and that these issues were in fact sheet music disguised as a periodical, and should be classified as third-class mail matter.

Conceding the principle established in the two cases just decided to be that the fact that books published at stated intervals and in consecutive numbers do not thereby become periodicals, even though in other respects they conform to the requirements of Act March 3, 1879, c. 180, § 14, 20 Stat. 359 (U. S. Comp. St. 1901, p. 2647), cases may still arise where the classification of a certain publication may be one of doubt. Such is this case. But we think that, although the question is largely one of law, determined by a comparison of the exhibit with the statute, there is some discretion left in the Postmaster General with respect to the classification of such publications as mail matter, and that the exercise of such discretion ought not to be interfered with unless the court be clearly of opinion that it was wrong. The Postmaster General is charged with the duty of examining these publications and of determining to which class of mail matter they properly belong; and we think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied. The consequence of a different rule would be that the court might be flooded by appeals of this kind to review the decision of the Postmaster General in every individual instance. In the case of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 104, 23 Sup. Ct. 33, 47 L. Ed. 90, 94, the post-office authorities were held to have acted beyond their authority in rejecting all correspondence with the plaintiff upon the subject of the treatment of diseases by mental action; but while it was said in that case that the question involved was a legal one, it was intimated that something must be left to the discretion of the Postmaster General.

It has long been the settled practice of this court in land cases to treat the findings of the Land Department upon questions of fact as conclusive, although such proceedings involve to a certain extent, the exercise of judicial power. As was said in *Burfenning v. Chicago, St. P., M. & O. R. Co.*, 163 U. S. 321, 323, 16 Sup. Ct. 1018, 1019, 41 L. Ed. 175, 176: "Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents



a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions, is conclusive, and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined" (citing cases). See also *Johnson v. Drew*, 171 U. S. 93, 18 Sup. Ct. 800, 43 L. Ed. 88; *Gardner v. Bonestell*, 180 U. S. 362, 21 Sup. Ct. 399, 45 L. Ed. 574.

But there is another class of cases in which the rule is somewhat differently, and perhaps more broadly, stated, and that is, that where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong. In the early case of *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 599, it was said that the official duties of the head of an executive department, whether imposed by act of Congress or resolution, are not mere ministerial duties; and, as was said by this court in the recent case of *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 324, 23 Sup. Ct. 702, 47 L. Ed. 1076: "Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever, under those circumstances, to review his determination by mandamus or injunction."

In *Marquez v. Frisbie*, 101 U. S. 473, 476, 25 L. Ed. 800, 801, which was a bill in equity to review the decision of the Land Department in a pre-emption case, Mr. Justice Miller remarked: "This means, and it is a sound principle, that where there is a mixed question of law and fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law had confided the matter is conclusive." In *Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62, it was held that the court would no more interfere by injunction than by mandamus to control the action of the head of a department; and in *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354, it was said that the courts will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, no appellate power being given them for that purpose. See, also, *United States ex rel. Redfield v. Windom*, 137 U. S. 636, 11 Sup. Ct. 197, 34 L. Ed. 811.

The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of

law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

Upon this principle, and because we thought the question involved one of law rather than of fact, and one of great general importance, we have reviewed the action of the Postmaster General in holding serial novels to be books rather than periodicals; but it is not intended to intimate that in every case hereafter arising the question whether a certain publication shall be considered a book or a periodical shall be reviewed by this court. In such case the decision of the Post-Office Department, rendered in the exercise of a reasonable discretion, will be treated as conclusive.

In the case of *Masters in Music* the question really is whether a pamphlet, complete in itself, treating of the works of a single master, with a greater part of the pamphlet devoted to specimens of his genius, shall be controlled by the cover, which declared that these numbers will be issued monthly, at a certain subscription price per year. Although a comparison of the exhibit with the statute may raise only a question of law, the action of the Postmaster General may have been, to a certain extent, guided by extraneous information obtained by him, so that the question involved would not be found merely a question of law, but a mixed question of law and fact. While, as already observed, the question is one of doubt, we think the decision of the Postmaster General, who is vested by Congress with the power to exercise his judgment and discretion in the matter, should be accepted as final.

The decree of the Court of Appeals is therefore affirmed.

Mr. Justice HARLAN, with whom concurred the CHIEF JUSTICE (dissenting).

The CHIEF JUSTICE and myself are of opinion that the publication here in question is second-class mailable matter, and cannot concur in the opinion and judgment of the court. Our reasons for dissenting are stated in the opinion filed by us in *Houghton v. Payne* (just decided) 194 U. S. 88, 24 Sup. Ct. 590, 48 L. Ed. 888.

But there are some things in the opinion of the court in this case to which we shall advert. It is said that the case is one of doubt. Now, it was admitted at the bar by the government that the publication known as *Masters in Music* would be carried in the mails as second-class matter if the question be decided in accordance with the construction placed upon the statute by the department for more than sixteen years continuously prior to the present ruling of the department. We had supposed it to be firmly settled that the established practice of an executive department charged with the execution of a statute will be respected and followed—especially if it has been long continued—unless such practice rests upon a construction of the statute which is clearly and obviously wrong. In *United States v.*

Philbrick, 120 U. S. 59, 7 Sup. Ct. 413, 30 L. Ed. 561, which involved the construction placed by an executive department upon an act of Congress, this court said: "Since it is not clear that that construction was erroneous, it ought not now to be overturned." So in *United States v. Healey*, 160 U. S. 145, 16 Sup. Ct. 247, 40 L. Ed. 372, the court said that it would accept the uniform interpretation by the Interior Department of an act relating to the public lands, "as the true one, if, upon examining the statute, we found its meaning to be at all doubtful or obscure."

The authorities to that effect are numerous. *Edwards v. Darby*, 12 Wheat. 206, 6 L. Ed. 603; *Hahn v. United States*, 107 U. S. 402, 2 Sup. Ct. 494, 27 L. Ed. 527; *United States v. Graham*, 110 U. S. 219, 3 Sup. Ct. 582, 28 L. Ed. 126; *Brown v. United States*, 113 U. S. 571, 5 Sup. Ct. 648, 28 L. Ed. 1080; *United States v. Philbrick*, 120 U. S. 59, 7 Sup. Ct. 413, 30 L. Ed. 561; *United States v. Johnston*, 124 U. S. 236, 8 Sup. Ct. 495, 31 L. Ed. 415; *United States v. Hill*, 120 U. S. 183, 7 Sup. Ct. 510, 30 L. Ed. 632; *United States v. Finnell*, 185 U. S. 236, 22 Sup. Ct. 633, 46 L. Ed. 890; *United States v. Alabama G. S. R. Co.*, 142 U. S. 615, 12 Sup. Ct. 306, 35 L. Ed. 1134; *Hewitt v. Schultz*, 180 U. S. 139, 157, 21 Sup. Ct. 309, 45 L. Ed. 463, 472. Some of them are cited in the opinion of the court in *Houghton v. Payne*. The rule of construction which this court has recognized for more than three-quarters of a century is now overthrown. For, it is adjudged that the practice of the Post-Office Department, covering a period of sixteen years and more, need not be regarded in this case, although the construction of the statute in question is admitted to be doubtful. We cannot give our assent to this view.<sup>29</sup>

<sup>29</sup> See *Houghton v. Payne*, 194 U. S. 88, 24 S. Ct. 590, 48 L. Ed. 888 (1904); *Payne v. United States ex rel. Railway Publ'g Co.*, 20 App. D. C. 581 (1902).

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